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Supreme Court of the United States

OCTOBER TERM, 1951

No. 176

MORRIS LELAND, APPELLANT,

vs.

STATE OF OREGON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

FILED JULY 6, 1951.

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SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

Case No. 15652

[File endorsement omitted.]

STATE OF OREGON, Respondent,

vs.

MORRIS LELAND, Appellant

PETITION FOR APPEAL—Filed May 24, 1951

Considering himself aggrieved by the final judgment of the Supreme Court of the State of Oregon and the sentence of death resulting therefrom, said final judgment being entered on the 28th day of February, 1951, Morris Leland, appellant herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment and conviction and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the stay of execution of said judgment of death, and that the material parts of the record, proceedings and papers upon which said final judgment and conviction was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, /s/ Howard F. Latourette, Counsel for Defendant Appellant, /s/ Ryan & Pelay, Of Counsel.

[fol. 4] IN THE SUPREME COURT OF OREGON

[File endorsement omitted.]

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed May 24, 1951

Morris Leland, defendant in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which he will rely in his prosecution of said appeal from the final judgment of the Supreme Court of the State of Oregon entered on the 28th day of February, 1951.

The Supreme Court of the State of Oregon erred:

1. The Courts below erred in upholding the validity of Oregon's statutes regarding the proof of insanity despite defendant's contention that said statutes, 26-929 and 23-122, OCLA, deprived defendant of his life and liberty without due process of law as guaranteed under the 14th Amendment to the United States Constitution; in that defendant was required to prove he was insane beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as a defense to a crime.

2. The Courts below erred in upholding the refusal of the trial Court to make available to defendant's counsel before trial a confession taken from defendant before he was advised of his right to be represented by counsel and before he was taken before a magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment to the United States Constitution.

[fol. 5] 3. The Courts below erred in sustaining defendant's conviction and sentence to death in the lethal chamber.

Wherefore, Defendant, Morris Leland, prays that the final decree of the Supreme Court of the State of Oregon

be reversed, and that defendant have such other relief as the Court may deem fit and proper.

/s/ Howard F. Latourette, Counsel for Defendant-Appellant, /s/ Ryan & Pelay, Of Counsel.

[fol. 6] STATEMENT REQUIRED BY PARAGRAPH 2, RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES (omitted in printing)

[fols. 7-8] IN THE SUPREME COURT OF OREGON

[Title omitted]

ORDER ALLOWING APPEAL—May 24, 1951

Morris Leland having made and filed his petition praying for appeal to the Supreme Court of the United States from the final judgment and conviction of this Court in this cause entered on the 28th day of February, 1951, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal and his statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered That said appeal be and the same hereby is allowed as prayed for.

And it is further ordered That the execution of the sentence of death be stayed and suspended until the termination of this appeal.

And it is further ordered That citation shall issue in accordance with law.

/s/ James T. Brand, Chief Justice of the Supreme Court of the State of Oregon.

[fols. 9-11] IN THE SUPREME COURT OF OREGON

MOTION TO PROCEED IN FORMA PAUPERIS AND SUPPORTING AFFIDAVIT—Filed May 24, 1951 (omitted in printing)

[fol. 12] Order Allowing Waiver of Fees (omitted in printing)

[fols. 13-32] Statement As to Jurisdiction (omitted in printing)

[fol. 33] In the Supreme Court of Oregon

State of Oregon, Respondent,

v.

Morris Leland, Appellant

Opinion—Filed February 7, 1951

Appeal from Circuit Court, Multnomah County.
James W. Crawford, Judge.
Argued and submitted October 4, 1950.
Thomas H. Ryan argued the cause for appellant. On the brief were Ryan & Pelay and Donald McEwen, of Portland.
John R. Collier, Deputy District Attorney, of Portland, argued the cause for Respondent. With him on the brief were John B. McCourt, District Attorney, and J. Raymond Carskadon, Deputy District Attorney, of Portland.
Before Lusk,* Chief Justice, and Brand,** Rossman, Hay, Latourette and Warner, Justices.
Lusk, J., affirmed.

[File endorsement omitted.]

[fol. 34] Lusk, J.

The defendant, Morris Leland, was indicted for first degree murder. He entered a plea of not guilty and also gave notice of an intention to prove insanity. Upon the

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* Chief justice when this case was argued.
** Chief Justice when this opinion was rendered.

trial the jury returned a verdict of guilty without recommendation of life imprisonment. The death penalty automatically followed, and the defendant has appealed, assigning twenty alleged errors.

The circumstances of the crime, as revealed by the defendant's confessions, were as follows: At about the hour of a quarter after four on the morning of Friday, August 5, 1949, the defendant accosted Thelma Taylor, a fifteen-year-old girl, on a street in the St. Johns district of the city of Portland, and induced her to accompany him to a lonely spot on the east bank of the Willamette River. At the time of their meeting the girl was on her way to board a bus which would have taken her to the vicinity of Hillsboro where she intended to pick beans. She remained in the company of the defendant until he murdered her on the following morning. On Friday he attempted to have sexual intercourse with her, but desisted on discovering that she was a virgin and that the act hurt her. Sometime during the course of that day he picked up a piece of steel eighteen inches long and one-half inch in diameter with the idea of killing the girl with it. He was also armed with a long knife, which he carried in a scabbard in his belt. The defendant and the girl slept Friday night on the river bank in a clump of trees, and the next morning he killed her by striking her over the head several times with the steel bar and stabbing her twice in the body. He covered her body with drift wood, wiped his finger prints from a lunch [fol. 35] pail which the girl had carried, threw the steel bar and knife into the river, disposed of the butts of cigarettes which he had smoked, and left the place.

At about two o'clock on the morning of August 11 the defendant was arrested for the theft of an automobile and brought to the Portland police station. There he told a sergeant of police that he wished to talk to a homicide officer because he had killed a girl. He led the police to the scene of the crime, freely telling them the story of its commission. Later in the morning he was questioned by John R. Collier, deputy district attorney for Multnomah County, and Captain William D. Browne, of the Portland police, and made a full confession, which was taken down by a stenographer. The confession was transcribed and

the defendant signed it. Still later in the day he told a police officer that he desired to make a written statement, was furnished pen and paper, and at 10:00 P. M. wrote out and signed another confession, which differs in some details from the statement previously signed by him.

The defendant did not testify, and there is no contradiction in the evidence of the foregoing facts save minor discrepancies in the defendant's own statements. What the officers found at the scene of the crime corroborated the defendant's confessions.

The defendant being without funds, the court appointed counsel to defend him. In the best tradition of the Bar these gentlemen discharged their duty to their client with zeal and ability, both in the trial court and here. That their efforts have been unsuccessful is no reflection upon them, for the crime was so wanton and inhuman, and so amply proved, that any other verdict than one of guilty [fol. 36] would have been a shocking miscarriage of justice, while the rights of the defendant were fully protected by a careful and able judge and no errors prejudicial to him were committed.

The first assignment of error is based upon the court's refusal to grant a postponement of the trial. The indictment was returned August 18, 1949. On August 22 Messrs. Thomas H. Ryan and Anthony Pelay, Jr., were appointed defendant's counsel by the court. On August 30 defendant's counsel served on the district attorney a notice of his intention to show in evidence that he was insane and mentally defective at the time of the commission of the alleged crime. On September 8 counsel for the defendant filed a written motion for ninety days' postponement of the date of trial, the case having been set for trial on September 22. The grounds of the motion were that the defendant needed additional time to prepare the case and to have proper psychiatric examination and study; that, owing to the extent and character of the publicity given the case in the Portland newspapers, the defendant would be unable to receive a fair trial at the time set; and that counsel had numerous other cases in the Supreme Court and the Circuit Court. The Circuit Court denied the motion for a ninety-day postponement, but reset the case for the 24th of October. On October 12 the defendant filed a mo-

tion for a sixty-day postponement from October 24 on grounds similar to those stated in the previous motion, and on the further grounds that the defendant needed more time in which to obtain the medical records from the Veterans Administration and other pertinent data concerning defendant's medical and psychiatric record, and that the psychiatrist employed by the defendant needed additional time to prepare himself to testify.

[fol. 37] The court granted a further continuance until October 27, on which day the trial commenced. It appears that, on the hearing of the motion filed October 12, Mr. Ryan and the judge hearing the motion agreed that the judge might ascertain from Dr. Henry H. Dixon, the psychiatrist employed by the defendant, whether Dr. Dixon would be ready to testify by October 27, and that Mr. Ryan would abide by the judge's decision, and that the judge was told in substance by Dr. Dixon that he would be ready to testify by that time. In fact, Dr. Dixon was not called as a witness until November 4, nine days after the trial commenced. It further appears that the defendant was able to obtain and introduce in evidence the medical records of the Veterans Administration relating to the defendant as well as other medical and psychiatric records.

The trial court's ruling on a motion for postponement will not be disturbed on appeal save for manifest abuse of discretion. State v. Mizis, 48 Or. 165, 175, 85 P. 611, 86 P. 361, and Oregon cases there cited. Actually, sixty-five days elapsed from the day defendant's counsel were appointed until the commencement of the trial and seventy-four days before Dr. Dixon took the witness stand. There is nothing in the record to indicate that Dr. Dixon was not fully prepared to testify at that time. The record shows that on the trial Mr. Ryan renewed the motion for postponement, and, in the course of a statement to the court with reference to the proceedings on the original presentation of the motion, said: "I disclosed to the court that Dr. Dixon, a psychiatrist whom we had employed in the case, would not be ready for trial, according to his information to us, for two weeks after the 24th of October". In fact, two weeks [fol. 38] elapsed after October 24 before Dr. Dixon was called to testify.

The fears of counsel that they would be unable to obtain evidence, such, for example, as the records of the Veterans Bureau, proved to be groundless. It is not now claimed that the defendant was unable to obtain any evidence, otherwise available, because the postponement requested was denied.

The newspaper articles referred to in the motion have not been brought to this court. But, whatever may have been their character, we have nothing but the unsupported statement of counsel that their publication had so excited the public mind that the defendant could not obtain a fair trial unless the requested postponement was granted. The examination of the jurors on their voir dire (save of two jurors with reference to other points) has not been brought to this court, and so we may safely assume that no such inflamed state of the public mind was disclosed by such examination as is claimed by the defendant.

We do not question counsel's good faith in seeking a postponement, but we may observe that frequently, when all other defenses fail, delay is the favorite expedient of the accused in a criminal case to escape paying the penalty for his crime. The defendant is, of course, entitled to a reasonable time to prepare for trial. He is also entitled to a fair trial, which has been well defined as "a trial before an impartial judge, an honest jury, and in an atmosphere of judicial calm." 14 Am. Jur., Criminal Law, 853, § 130; State v. Gossett, 117 S. C. 76, 108 S. E. 290, 16 A. L. R. 1299. The Gossett case is cited by counsel for defendant, but it falls far short of supporting their contention. In that [fol. 39] case the court held unconstitutional a law which authorized the governor of the state, upon application of the local prosecuting officer, to order an extra term of court. The case was one in which the defendants, who were accused of rape, were brought to trial three days after their indictment and under such circumstances as to lead the court to say of the procedure provided in the section held invalid, that it "is a bald concession to the spirit of mob law, and presents the spectacle of the law, strong and mighty, bowing to the despotism of the mob, which has been declared to be greater than the tyranny of a despot." It appears from the opinion that the foreman of the grand

jury of Abbeville County (in which the defendants were indicted) made affidavit to the effect that the defendants could not safely be brought to that county on account of prevailing hot sentiment; that the sheriff of the county recommended military protection during the trial that was approaching; and that more than 100 affidavits were submitted by the defendants upon their motion for a change of venue on the ground that a fair trial could not be had. Nothing in the record before us even faintly resembles the situation portrayed by the foregoing recital. In our opinion, the defendant had ample time in which to prepare his defense, and there is no such showing of prejudice against him as to warrant the conclusion that he could not, and did not, have a fair trial. The court did not err in denying the motion for a postponement.

Prior to the date of trial the defendant served upon the district attorney a motion to require the latter to disclose and make available to counsel for the defendant "the alleged [fol. 40] confession of the defendant and all records pertaining to the death of Thelma A. Taylor taken by the coroner's office." While not specified in the motion, the briefs, as well as the proceedings in the court below, show that the motion was directed only to the confession which was taken down by a stenographer, and not to the one which the defendant later wrote out in his own hand. The former is State's Exhibit 15, the latter State's Exhibit 18. This motion does not appear to have been argued until immediately before the commencement of the trial when defendant's counsel orally moved for an order permitting them to examine the confession. The court denied the motion, and this ruling, so far as the confession alone is concerned, is made the basis of an assignment of error. The question arose again upon the trial before the confession was introduced in evidence, and at that time the court informed counsel for the defendant that, if they desired "an additional recess" in order to go over the confession after it had been offered and received, he would grant it. The basis of the motion was, as stated in the defendant's brief, "to enable defendant's counsel to properly prepare their case in the light of the defendant's inability to aid counsel because of his mental condition"; and particularly

that, as defendant was relying on the defense of insanity, an inspection of the confession by defendant's experts was needed in order that they might prepare themselves properly to testify. It sufficiently appears that the only psychiatrist upon whom defendant's counsel were depending for this purpose was Dr. Dixon, who took the stand two days after the confession had been identified as an exhibit in the case.

[fol. 41] So far as we are advised, the question presented by this assignment of error has never been determined by this court. It is a different question from that decided in State v. Yee Guck, 99 Or. 231, 195 P. 363, and State v. Brake, 99 Or. 310, 195 P. 583, which dealt with the unsigned memoranda of statements made by witnesses for the state. It was held that, since such memoranda were not admissible in evidence, their production could not be compelled on the trial as an aid to cross-examination for the purpose of impeachment. State v. Steeves, 29 Or. 84, 43 P. 947, is likewise distinguishable because the point in that case was that, where the state sought to impeach its own witness by inconsistent statements in a written confession signed by him, it was required to show the witness the writing in accordance with the terms of § 4-712, O. C. L. A.

We will consider the decisions from other states. People v. Becker, 210 N. Y. 274, 104 N. E. 396, cited by the defendant, holds that, where it developed on the cross-examination of an avowed accomplice testifying for the state, that the witness had signed a written confession which was in the possession of the district attorney, and the defendant's attorney demanded production of the confession solely for the purpose of impeachment of the witness, it was error to deny the request. The Becker case is not in point because it turns upon the right to inspection at the trial as an aid to cross-examination, a question not before us.

In People ex rel. Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84, 52 A. L. R. 200, the court held that a trial judge exceeded his powers in ordering the prosecuting [fol. 42] attorney to make available for inspection by counsel for the defense, in a murder case where poisoning of the victim was changed, all reports made to the district attorney of chemical analysis of the body of the deceased

and other similar documents. As in our own cases, the court put its decision on the ground that the documents were not admissible in evidence. The opinion was written by Judge Cardozo and will be referred to again for its discussion of the very question which we must decide here.

State v. Tippett, 317 Mo. 319, 296 S. W. 132, cited by the defendant, goes so far as to hold that the defendant in a criminal case has the right to compel production before trial of a written statement given to the prosecuting attorney by a witness. This decision, of course, is out of harmony with the law as previously laid down by this court, and the Missouri court conceded its inability to find an authority in point.

There are a number of cases which deal with confessions signed by the defendant and admissible in evidence. Davis v. State, 99 Tex. Crim. Rep. 517, 270 S. W. 1022, holds that there is no law which would require the state at the beginning of the trial to deliver the defendant's confession to his counsel. A similar holding in Goode v. State, 57 Tex. Crim. Rep. 220, 123 S. W. 597, reasons that the confession sought to be inspected was not a public document but "a part of the proceedings of the grand jury, and for that reason subject to the seal of secrecy until and unless offered as a criminating circumstance or testimony against appellant." The Ohio Supreme Court denies the existence of the power in State v. Yeoman, 112 Oh. St. 214, 147 N. E. 3, [fol. 43] where it reversed the trial judge for ordering the prosecuting attorney to permit the attorneys for the defendant to inspect his confession. In Washington the power is held to be discretionary with the trial court. State v. Clark, 21 Wash. 2d 774, 153 P. 2d 297.

The strongest decision for the defendant is State v. Dorsey, 211 La. 928, 955, 22 So. 2d 273, which holds that the court's refusal of a pretrial demand by the defendant for permission to inspect and make a copy of a written confession, which the state intended to introduce in evidence, was tantamount to depriving him of a fair and impartial trial and thus a violation of his constitutional rights. The court conceded that the power did not exist at common law, cited a number of cases opposed to its conclusion and none which supported it, and was able to point to no

statutory authority. The decision seems to have been largely influenced by Wigmore's discussion of the subject, VI Wigmore on Evidence (3d ed.) 395, § 1850, and an account, quoted in Wigmore, by the Hon. Charles S. Whitman, of the pre-trial practice in England under which all the evidence of the Crown is disclosed in the preliminary examination before the magistrate. Among other things, Governor Whitman said:

> "* * * All of the evidence in the possession of the Crown is in the possession of the counsel for the defendant. He knows all that the Crown knows. He has all the evidence in his possession before the witness goes on the stand. He has all the evidence that can be presented in that court at trial, before the trial begins. * * *"

After quoting the foregoing the court proceeded:

> "From the above it would appear that the common-law rule on this point has been changed or greatly relaxed in England as a result of this pre-trial procedure. [fol. 44] And we see no necessity for following the old common-law rule in the State, in the absence of any prohibitory statute or decisions of this court on the point, solely and only for the reason that several states in the Union continue to do so."

The defendant in the Dorsey case claimed in his motion that knowledge of the contents of the confession was important and material in the proper preparation of his defense; and we take it that the rule of that case is that, whenever application on such a ground for inspection of a confession signed by the defendant is refused, the court's action is in effect the denial of the right to a fair and impartial trial.

Counsel for the defendant invoke § 10-401, O. C. L. A., which provides in part:

> "The court or judge thereof, while an action or suit is pending, may order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document or paper

in his possession, or under his control, containing evidence or matters relating to the merits of the action or suit, or the defense therein."

In State v. Yee Guck, supra, the court indicated obiter that this section, though it is a part of the Code of Civil Procedure, is applicable in criminal cases by saying: "It would seem also that Section 533, Or. L. (now § 10-401, O. C. L. A.), would be applicable in a proper case to the matter in hand". The opinion proceeded: "The power of the court under this section is clearly discretionary. The language is not mandatory." (99 Or. 236).

[fol. 45] Judge Cardozo in People ex rel. Lemon v. Supreme Court, supra, while leaving the question open, suggested that there may be "a supervisory jurisdiction, as yet unplumbed and unexhausted, in respect of criminal prosecutions" to order discovery in cases of this kind. And, referring to the New York statute that the rules of evidence shall be the same in criminal as in civil causes, he wrote: "The provisions of the Civil Codes for the discovery of documents are not rules of evidence in the strict sense. They are closely akin, however, to such rules, for they govern and define the remedies whereby evidence is made available." We have a similar provision in this state respecting evidence in civil and criminal actions and proceedings. § 26-932, O. C. L. A. Judge Cardozo's discussion of the subject shows that, while at common law the power of the criminal courts to compel production of documents admissible in evidence is denied, "Later cases exhibit a more conciliatory tendency where the document is one that may be received as an exhibit." Among other illustrations is a case where the exhibit is the basis of the charge, as, for example, where the indictment is for sending a threatening letter. Rex v. Harrie, 6 Car. & P. 105. See cases in the annotation at 52 A. L. R. 207.

We are not prepared to go so far as the Louisiana court in State v. Dorsey. Not only do we fail to find either at common law or under statute authority for the rule of that decision, but we have grave doubts whether such a rule is either necessary or desirable. "Such a measure may of course be abused by the unscrupulous. Therefore, its allowance should be left to the trial judge's discretion." Wig-

more, op. cit. p. 395. The rights of the defendant will be fully protected if the power to compel production of evidence in possession of the state is committed to the sound [fol. 46] discretion of the trial judge, subject to a review by this court for abuse. There should be no great difficulty in determining, after the record has been fully made up, whether a defendant has *in fact* been deprived of his right to a fair and impartial trial by denial of the motion.

It requires no undue strain upon the meaning of language to hold that § 26-932, O. C. L. A., providing "The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings * * *", is broad enough to include the authority vested in the court by § 10-401, O. C. L. A., to order a party to produce evidence in his possession before the trial. We approve the dictum of the Yee Guck case and hold that the Circuit Court in the instant case had discretionary power to grant the defendant's motion for permission to inspect the confession.

The inquiry, then, is whether the denial of the application amounted to an abuse of discretion. The written motion itself sets forth no grounds for its allowance. The grounds specified by defendant's counsel, upon the oral application made just before the commencement of the trial, are, first, "in order to determine whether or not the statement made by the defendant is a rational statement, or an accurate statement, of the facts as he has related them to me", and, second, "I intend to attack the validity of the confession as regards the formalities of taking it." Counsel added: "He (the defendant) doesn't know what he said, and I think it is only fair that I be apprised of what it says and be given an opportunity to examine the same before the trial gets under way." During the trial, when the matter was again referred to in connection with a [fol. 47] motion by the defendant to exclude the confession from evidence, Mr. Ryan, of counsel for the defendant, informed the court that if they had had available a copy of the confession "perhaps my opening statement would have been different, and the matter of my conduct of this case would have been different," and laid emphasis on the point that Captain Browne had testified on the pre-

liminary inquiry relative to the voluntary character of the confession, that he had told the prisoner before it was made that it "could be used for or against him". At one point in the confession the following appears:

> "Q. Well, when you killed her, what made you make your decision that you should kill her?
>
> "A. It just come to me (snapping fingers), just the second she started screaming."

Referring to this answer, it is argued that Dr. Dixon's testimony would have been much more effective "had this typically diseased behavior of the defendant been discussed and analyzed by him before his testimony".

After careful consideration of all these matters and the entire record of the case, we have reached the conclusion that this assignment of error cannot be sustained. Not only did two days elapse after the confession was produced in court before Dr. Dixon testified, but three more days elapsed before the defendant finally rested his case. If additional time was needed by Dr. Dixon to consider the confession or any particular portion of it in its relation to the defendant's mental condition, he could have taken it, and defendant's counsel could have recalled him to the witness stand. There is nothing in Dr. Dixon's testimony to indicate that he needed further time for preparation, and it may be assumed that he did not because counsel for defendant did not accept the court's offer to grant a [fol. 48] recess for that purpose if it should be requested. The record hardly bears out counsel's unsupported statement that the defendant did not know what he said in the confession. It is not supported by the defendant, for he did not testify. The testimony of Dr. Dixon, who interviewed the defendant before the trial, suggests the contrary. He testified "I don't feel there is any impairment of memory in this case." Since the defendant's counsel do not advise us in what particular the opening statement or the conduct of the trial would have been different had they been permitted to inspect the confession, we are not required to speculate upon this claim, or to assume some prejudice to the defendant's case that has not been disclosed.

We are somewhat mystified by the argument, based upon the testimony by Captain Browne, that he told the defendant that his confession could be used for or against him. Since this statement does not appear in State's Exhibit 15 inspection of that document would not have disclosed it. If counsel contend, as they seem to, that the statement amounts to an agreement to make the confession available to defendant before the trial, we think the contention is extreme. If, perchance, there should be anything in the confession that would help the defendant he would have the benefit of it—that is all that we are able to make out of what Captain Browne said to him.

Dr. Dixon testified to his "reaction" to certain statements of the defendant which appear in State's Exhibit 15, including the answer which we have quoted above. He volunteered that the defendant told him "relatively the same story" that is found in State's Exhibit 15. Based upon this interview and such other information as he was able to obtain about the defendant's history, he was of the opinion, to which he testified, that the defendant was an [fol. 49] individual who is "unable to plan ahead" or "premeditate". We are not told how he could have improved his knowledge of the case or testified more effectively had he been afforded a pre-trial inspection of the confession, and we are far from convinced that this claim has any basis in fact.

The admissibility of the defendant's various confessions will be discussed later in this opinion, but, since one of the grounds for the motion to inspect was that counsel intended "to attack the validity of the confession as regards the formality of taking it", it should be said at this point that a pre-trial inspection of the confession would not have aided counsel in his attack in the slightest degree.

We are of the opinion that the Circuit Court did not abuse its discretion in denying the motion for an inspection of State's Exhibit 15 and that no prejudice resulted to the defendant from the ruling.

During the voir dire examination of the jury, a prospective juror, Joseph C. Rolison, was questioned by counsel for the defendant as to whether he had any conscientious scruples against capital punishment, and indicated that the

answer to the question would depend upon whether or not a sentence of life imprisonment meant that the person would actually be incarcerated for the remainder of his life. The court interrupted with the following statement:

"Well, there are probably six forms of verdict to be submitted to you. Of course, if one is found guilty of murder in the first degree without a recommendation of life imprisonment by a jury, why, then the person is executed. If there is a recommendation by the jury on conviction of first degree, a recommendation by the jury, then the imprisonment would be for life, and that is the law. As a practical matter, how long he would serve I have no idea, nor do you. That would be up to the Board of Probation and Parole very [fol. 50] largely. Do you have any—you say with one reservation you don't have any objection or conscientious scruples against the imposition of the death penalty? What is that?"

The examination proceeded, and Mr. Rolison stated that he could not bring in a verdict of death if he knew that "the person was going to be imprisoned for the rest of his life." Later the deputy district attorney examined Mr. Rolison and the following occurred:

"Q. You heard the court explain that it was up to the parole board on a life imprisonment——

"Mr. Ryan: If the court please, I object to that. I don't think that has any part in this case, to go into the question of what the parole board is going to do with this boy in the event they find him guilty. It puts us at a terrible disadvantage, and at this time I ask for a mistrial.

"The Court: I will deny the motion. Ordinarily you would be quite right, Mr. Ryan, but the juror has asked for this very information, in effect, by his statement, two or three times, that he would not favor life imprisonment, or would not favor the death penalty provided one could be put away for life; making it necessary that this further explanation be given to him. But if that is a condition under which the juror would

sit, I would be inclined to think that he should be excused."

The ruling is assigned as error, the defendant's counsel contending that it was prejudicial to their client's rights to bring before the jury the possibility that the defendant would be paroled if he should be sentenced to life imprisonment. They cite four cases: Fair v. State, 168 Ga. 409, 148 S. E. 144; Berry v. Commonwealth, 227 Ky. 528, 13 S. W. 2d 521; State v. Johnson, 151 La. 625, 92 So. 139; State v. Blackman, 108 La. 121, 32 So. 334, 92 Am. St. Rep. 377. These are all cases in which the prosecuting attorney in the argument to the jury sought to secure a verdict of [fol. 51] death by statements to the effect that persons sentenced to life imprisonment rarely served out their terms. Typical is Berry v. Commonwealth in which the objectionable argument was as follows: "Send him (the defendant) to the penitentiary and in a few years some softhearted Governor will pardon him and turn him loose on society to kill somebody else." Again, in State v. Johnson, the assistant district attorney told the jury that the law which authorized the jury to fix the sentence, either of capital punishment or life imprisonment, "is a farce, or rather a fiction of the law. It does not mean what it says. It only means that the defendant would be sentenced to serve his natural lifetime in the penitentiary, and history shows that, after a short period of time, say 5, 10, or 15 years, he would be turned loose again on society." (151 La. 632) In all the cases cited by defendant arguments of this type were held to be prejudicial and ground for reversal.

We are not concerned here with a case of an appeal to the jury to bring in a verdict of death because of the probability that a sentence of life imprisonment actually means imprisonment for only a few years, but with a case in which the court, responding to the apparent difficulty a prospective juror was having with the question, undertook to explain it. The present case is much more like Postell v. Commonwealth, 174 Ky. 272, 192 S. W. 39, and Lawler v. Commonwealth, 182 Ky. 185, 206 S. W. 306, than the decisions on which the defendant relies. In the Postell case it appears that, after the jury had commenced to deliberate upon its verdict, it came into the courtroom and

asked the court if a prisoner under a life sentence was subject at any time to a parole from the Board of Prison Commissioners. The court gave an affirmative answer, and the [fol. 52] jury retired and afterward returned the death verdict. The court said:

> "* * * This, if it occurred, was error, because the jury's verdict should not be influenced by what another department of the state government might or might not do, or had authority to do. It is to be guided only by the facts pertaining to the guilt or innocence of the accused, and the law applicable thereto. But, as this is not shown by the bill of exceptions, we do not reverse the case because of it, mentioning it only for the guidance of the trial and other courts in the future."

We note in passing that the statement in Berry v. Commonwealth, supra, 227 Ky. 528, 550, that the judgment in the Postell case was reversed because of this action of the trial judge, is erroneous. The judgment was reversed, but on other grounds. In Lawler v. Commonwealth the misconduct complained of was a statement made by the prosecuting attorney on the voir dire examination of a prospective juror "that one convicted of a life sentence was under the law subject to be paroled after eight years' service in prison." As to this the court said:

> "* * * Whether this was calculated to influence the juror for or against the defendant is problematical. A humane juror might be induced thereby to give the lighter penalty, while another less humane might thereby be induced to impose the heavier one. At any rate we think the question was improper, and the court should not have permitted it to be asked. We do not, however, regard it so prejudicial as was the imparting of similar information to the jury by the judge of the court, as shown in the case of Postell v. Commonwealth, 174 Ky. 272. In that case the jury had heard all the evidence and had deliberated on the case. The circumstances under which they were informed as to the parole law indicated that they were about to arrive at a verdict and such information was calculated to influence them. When the question was asked the

juror in the instance case no evidence had been heard, and neither the degree of offense nor the defendant's connection with it had been placed before the jury. [fol. 53] We are of the opinion, however, that under the interpretation given to sec. 281 of the Criminal Code this alleged error can not be considered by us."

Our statute, § 23-411, O. C. L. A., provides:

> "Every person convicted of murder in the first degree shall be punished with death, except when the trial jury shall, in its verdict, recommend life imprisonment, in which case the penalty shall be life imprisonment * * *."

In fixing the penalty in a first degree murder case, the jury's choice is between capital punishment and a sentence of life imprisonment. The possibility of pardon or parole, purely speculative, should not enter into the jury's deliberations, and was irrelevant on the voir dire examination. We, therefore, agree with counsel for the defendant that it was improper for the court to make the statement that it did in this regard, and also improper for the assistant district attorney afterwards to call attention to the court's statement. We are not convinced, however, that the incident resulted in any prejudice to the defendant. We agree with the observations of the Kentucky court in Lawler v. Commonwealth about the very similar occurrence in that case. It should be remembered that the statements complained of were made while the jury was being selected and some eleven days before the case was finally submitted. In the instructions the court told the jury that if it brought in a verdict of murder in the first degree, with a recommendation of life imprisonment, "this recommendation is mandatory and imposes compulsory action on the court. In such event the penalty is imprisonment for life, and you shall assume life imprisonment means imprisonment for life." This was the last word that [fol. 54] the jury heard upon the question from the court. The assignment of error cannot be sustained.

The appellant assigns as error the action of the court in excusing three jurors because they had conscientious

scruples against capital punishment. It is doubtful whether the alleged error is properly before us, but we have nevertheless examined the contention of counsel, which is to the following effect: In 1914 capital punishment in this state was abolished by constitutional amendment. See General Laws of Oregon 1915, p. 12. In 1920 capital punishment was reinstated as the punishment for murder in the first degree, the jury being given the power to recommend life imprisonment. Const., Art. I, § 37; §23-411, O. C. L. A.

Section 26-917 (6), O. C. L. A., provides that a cause for which a challenge for implied bias may be taken is the following: "If the offense be punishable with death, the entertaining of such conscientious opinions as would preclude a person from finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror." This statute has remained unchanged since its enactment in 1864. It is not claimed that it was repealed by the constitutional provision abolishing capital punishment. It is contended, however, that since, at the time the statute was enacted, the death penalty on conviction of first degree murder was mandatory, "conscientious scruples against capital punishment would affect the enforcement of the law"; but, as we understand it, that this is not true under the present legislation authorizing the jury to recommend life imprisonment (§ 23-[fol. 55] 411, O. C. L. A.), and therefore Subd. 6 of § 26-917 has been repealed by § 23-411. Alternatively, it is argued that, if the repeal has not been effected, then § 26-917 is unconstitutional because it violates the provision of Art. I § 11, of the State Constitution that "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury". The defendant's brief says: "The effect of the provision automatically excusing persons who are opposed to capital punishment means that the jury will be composed of persons whose attitude is more harsh and who are more prone to be vindictive in the enforcement of laws and the punishment of crime."

The claim that the section in question has been repealed is answered by the simple statement that there is no con-

flict between it and the present law providing for capital punishment.

The constitutional point rests upon the false premise that a person who believes in capital punishment, or at least one who has no conscientious scruples against it, is apt to be unfair and vindictive. This is practically an indictment of the people of Oregon, for it is by their will that capital punishment is authorized in this state. The statute on that subject is substantially the same as the constitutional provision. Const., Art. I, § 37. Both reflect the policy of the State that the ends of justice and the protection of the public are subserved in specific instances by putting to death a person convicted of murder in the first degree, the jury being invested with the power to determine whether a particular case calls for the extreme penalty. The Constitution and the statutes assume, as well they may, that a man or a woman may have no conscientious [fol. 56] scruples against capital punishment and yet be a fair and impartial juror. The state has rights as well as the defendant; it would be deprived of an important right were it forced, in a case in which its representatives conscientiously believed that it was their duty to demand the death penalty, to accept even a single juror whose convictions upon the subject of capital punishment would prevent him from exercising the discretion committed to the jury by the Constitution and the statute.

During the thirty years that have elapsed since capital punishment was reinstated in Oregon it has been the uniform practice to apply the provision now challenged in first degree murder cases. This practice is not conclusive against the defendant's contention; it does, however, fortify the conclusion that it is without merit. One might just as well argue that capital punishment itself is unconstitutional. This has been done, but to no avail. State v. Butchek, 121 Or. 141, 153, 253 P. 367, 254 P. 805.

Assignments of Error 5, 7 and 9 present similar questions and will be considered together.

By assignment 5 it is contended that the court erred in admitting over defendant's objection the testimony of Officers Wiles and Mitola as to confessions of the defendant to them. These confessions consisted of the statements

made by the defendant shortly after he was brought to the county jail on the early morning of August 11, when he told Officer Wiles that he wanted to talk to a homicide officer about a murder, and proceeded to relate the story of the crime, first in the police station and later on the way to and at the scene of the crime. The ground of the ob- [fol. 57] jections was that the officers did not advise the defendant that anything he might say would be used against him, or of his right to counsel, or his right to be taken before a magistrate.

Assignment 7 is based upon the admission in evidence over defendant's objection of State's Exhibit 15, the transcribed confession, and Assignment 9 upon the admission in evidence of State's Exhibit 18, the confession which the defendant wrote in his own hand. In addition to the grounds asserted in support of the objections to the testimony of the officers, it was claimed at the trial, and is claimed here, that the confession, Exhibit 15, was not voluntary. The objection to Exhibit 18 is that the defendant should have been first taken before a magistrate where he would have been informed of his constitutional rights. §§ 26-1515, 26-1519, 26-1547 and 26-1556, O. C. L. A.

The contention that a voluntary confession made before the accused has been taken before a magistrate is inadmissible in evidence is determined adversely to the defendant on the authority of State v. Eolkes, 174 Or. 568, 587, 150 P. 2d 17, 323 U. S. 779, 89 L. ed. 622, 65 S. Ct. 189; and the claim that unless the defendant was first advised of his constitutional rights his confession would be inadmissible, conflicts with the law as laid down in State v. Henderson, 182 Or. 147, 173, 184 P. 2d 392, and State v. Butchek, supra, 121 Or. 153. In this connection it is to be observed that before the defendant made the confession, State's Exhibit 15, Deputy District Attorney Collier advised him as follows:

> [fol. 58] "That is right. I will explain to you: You do not have to make any statement at all. And if you do make a statement it must be made of your own free-will and voluntarily on your part, without any threats or coercion on the part of anyone. And if you

make the statement it can and will be used against you. Now, do you understand what I have said?"

The objections on these grounds are without merit.

Neither is there merit in the contention that the confession, State's Exhibit 15, was not voluntarily made. There is not the slightest suggestion in the evidence that any influence whatever was brought to bear upon the defendant to induce him to make the statement—not even persuasion. In fact, nothing of this kind is claimed; the position of counsel on the question may be best shown by quoting his objection made on the trial:

"(By Mr. Ryan) I move at this time for the exclusion of the confession. First, it is evident from the testimony here adduced, and the testimony of Officer Mitola, that the defendant had been awake since the early morning on the 11th and was still awake at 2:00 o'clock when he came in to the jail. And instead of being given an opportunity to sleep he was—the questioning continued until approximately 7:00 o'clock, at which time he was ready, because of his fatigue and highly nervous state, and because of other factors, which indicate his mental incapacity, to make this statement. There was—the reason for the speed and hurry on this, in my opinion—and I think it is a fact—was that they wanted to have him make a statement while he was in the mood and before he had an opportunity to get counsel or to appear before a magistrate for a hearing, at which time, upon reflection or upon advice, he would be aware of his rights not to make a statement. I move on that ground. I have some other grounds."

[fol. 59] All this is urged in the face of the fact that the defendant had theretofore, without prompting or suggestion from anyone, entirely on his own motion, told the officers about his commission of a murder of which they had never heard up to that time (as in State v. Butchek, supra), and of the further fact that on the evening of the same day he asked for paper and pen so that he could write out another confession. It is, of course, entirely possible

that the defendant's "mental incapacity" had something to do with his apparent eagerness to confess, not once but several times; on the other hand, it may have been due to those gnawings of conscience which sometimes impel even the most depraved of human beings to divulge their crimes. This is the view that the jury, which ultimately passed on the question of the voluntary character of the confessions, had a right to take.

Assignments of error 5, 7 and 9 are devoid of merit.

Assignments of error 6, 8, 10, 15 and 17 present a common objection, to-wit: The gruesome character of certain exhibits admitted in evidence. These were the clothing worn by the mudered girl, a billfold and its contents taken from the pocket of the "levis" she wore at the time that she was killed, and a photograph of the girl's body taken in the morgue after her clothes had been removed.

The defendant's plea of not guilty put in issue every material allegation of the indictment, including not only the fact of the killing of Thelma Taylor by the defendant, but that it was done "unlawfully and feloniously, purposely and of deliberate and premeditated malice". The state had the burden of proving all the elements of the crime to the satisfaction of the jury beyond a reasonable doubt if it [fol. 60] was to establish the charge of first degree murder. To this end evidence corroborating the defendant's confessions was essential. § 26-939, O. C. L. A. The wounds inflicted upon the dead girl shown in the photograph, and the holes in the jacket, blouse and brassiere which she had worn, evidently made by a knife blade, tended to show that the crime was committed in the manner described in the confessions, and these exhibits were also relevant upon the question of deliberation and premeditation. State v. Butchek, supra, 121 Or. 155 et seq. Two identification cards found in the billfold tended to prove that the body found by the officers was the body of Thelma Taylor. The "levis" of blue denim further tended to corroborate the statement by the defendant in the confession, State's Exhibit 15, that the girl was wearing a garment of that description. The fact that these items of evidence were cumulative, that possibly the case could have been sufficiently proved without them, is not controlling. Nor was the state bound to

content itself with admissions made on the trial by defendant's counsel for the purpose of keeping out this damaging evidence. As long as the defendant's plea of not guilty stood, the state had the right to prove its case up to the hilt and to choose its own way of doing so (State v. Grieco, 184 Or. 253, 259, 195 P. 2d 183; State v. Young, 52 Or. 227, 230, 96 P. 1067, 132 Am. St. Rep. 689, 18 L. R. A. (n. s.) 688), subject only to the rules of evidence and the standard of fair play which should govern the prosecution of every criminal case. There is no rule which requires the district attorney to be mealy-mouthed or to withhold material evidence, either because it is offensive to the defendant or his counsel or shocking to the sensibilities [fol. 61] of jurors. This is a shocking case. As counsel for defendant said in his opening statement to the jury, "the evidence is going to be of a gruesome detail." How it could be otherwise in a case of this kind we do not know. Some of the exhibits in question, particularly the photograph of the corpse, are indeed gruesome, but they were all relevant and, therefore, properly received in evidence. Our decisions fully support this conclusion. State v. Garver, ___ Or. ___, 225 P. 2d 771; State v. Grieco, supra; State v. Henderson, supra, and Oregon cases there cited. These assignments of error are without merit.

In connection with the assignments of error just disposed of we may discuss the defendant's contention that the court erred in permitting Dr. Vinton D. Sneeden to testify, over the objection of defendant's counsel, in unnecessary detail concerning the cause of death of Thelma Taylor. Dr. Sneeden performed the autopsy and was examined about his findings. He identified the photograph of the corpse which was received in evidence, and testified that the picture would aid him in explaining his findings to the jury. He was permitted to use the picture for that purpose, and did testify in considerable detail as to the numerous wounds that had been inflicted upon the head and body of Thelma Taylor, and gave his opinion as to their effect. The argument in support of the assignment of error is, in substance, the same as that which is urged against the admission in evidence against the photograph, that is to say, that it would incite the jury to hostility against the de-

fendant. It was the duty of the state to prove the cause of death as alleged in the indictment. Dr. Sneeden was a competent witness for that purpose. His testimony was of a technical character, and it was a matter of discretion [fol. 62] with the trial judge to determine the extent of the detail which would be permitted the witness. We find no abuse of such discretion, and, for the reasons given in overruling the assignments of error regarding the admission of the alleged gruesome exhibits, this assignment of error is likewise found to be without merit.

Upon cross-examination of Dr. Dixon the witness was permitted, over the objection of counsel for the defendant, to answer questions as to whether the defendant was legally sane, that is, whether he knew the difference between right and wrong. Dr. Dixon testified in substance that the defendant did know the difference between right and wrong. The ground of the objection was that this testimony invaded the province of the jury, and the objection is reiterated here, notwithstanding the fact that counsel for the defendant, on the direct examination of Dr. Dixon, elicited testimony from him favorable to the defendant which was equally open to this objection, assuming that it has any merit. The point, however, has been settled adversely to the defendant's contention in State v. Roselair, 57 Or. 8, 109 P. 865, in which, after careful consideration, this court held that testimony by an expert, identical to that given by Dr. Dixon, was properly received. The same argument that the defendant makes here was made there and rejected. The doctrine of that decision is the settled law of this state. See, also, 32 C. J. S., Evidence, § 520.

[fol. 63] Another assignment of error is based upon a similar ruling with respect to the testimony of Dr. Benjamin F. Williams, a psychiatrist called by the state. It is disposed of by what we have just said.

On the cross-examination of Dr. John W. Evans, a psychiatrist called by the state, counsel for the defendant questioned the witness concerning the conduct of psychopaths, evidently for the purpose of attempting to show that the defendant, who concededly had "a psychopathic personality", was unable to form a plan and carry it out, or, in

other words, to premeditate. The following is a part of the cross-examination:

"Q. Well, isn't it true that this type of person is generally a creature of the moment?

"A. Yes, yes.

"Q. And, unlike other persons, if panic once overtakes them, they are going to act on it much more easily than a normal person?

"A. That is true, very true.

"Q. And in a moment of panic, of impulse, and having, as Dr. Dixon used the term, the stimulus, having once had the stimulus for their course of action and become excited by it, then they don't act on reflection?

"A. That is true.

"Q. And if this girl started screaming and he said 'It came to me like that,' is that generally the way they make decisions?

"A. That is right; under the stress of strong stimuli, you see.

"Q. And that would be consistent, entirely consistent, with the psychopath's behavior?

"A. Yes, yes."

[fol. 64] The question, "And if this girl started screaming and he said 'It came to me like that' ", had reference to a statement made by the defendant in his confession in answer to the question, "what made you make your decision that you should kill her?" As disclosed by State's Exhibit 15, the defendant answered: "It just come to me (snapping fingers), just the second she started screaming." Prior to giving this answer the defendant had described the murder in great detail. Among other things, he said that a freight train came by the place where he and the girl were, that the trainmen were switching cars, and the girl started to scream, and screamed loud enough for the men to hear her, whereupon he struck her on the head with the steel bar and continued to strike her until she quit screaming, and then "knocked her out" by hitting her across the forehead and then "stabbed her once or twice".

On re-direct examination the district attorney pro-

pounded to the witness a long hypothetical question based entirely on State's Exhibit 15, which concluded as follows: "Now, taking those things into consideration, would you say that he had acted impulsively and on the spur of the moment, or would you say that the passing of the train put into execution an already made plan?" Counsel for the defendant interposed an objection that portions of the question were inconsistent with the record and that the question did not include all the statements in the confession. He pointed to a number of facts which he claimed should have been included. He further objected on the ground that the answer called for by the question would [fol. 65] invade the province of the jury, an objection which need not be further noticed. The court overruled the objection, and the witness answered to the effect that "the man certainly had the ability to control himself." The ruling is assigned as error.

The hypothetical question was a fair resume of the confession. It did not, it is true, include everything which the defendant said, but everything in it was based upon what the defendant did say. And, since some parts of the confession were, or might be found by the jury to be, inconsistent with others, or with other evidence in the record, counsel's demand was a highly unreasonable one. For example, he insisted that the question should assume the truth of a statement of the defendant which appears in State's Exhibit 15 that "the reason I killed her was because she started screaming, I had no intention of killing her originally." This might be found to be inconsistent with what the defendant wrote in the confession, State's Exhibit 18, "on the same said Friday I picked up a piece of steel 18 in. long ½ in. round with the idea of killing her with it."

The rule respecting the contents of a hypothetical question, as laid down by this court, is as follows: "If plaintiff asks a fair question based on substantial evidence he may have the expert's opinion on any combination of facts he may choose. He need not include in the question all the details which appear in his own case and certainly cannot include the contradictory matter in his opponent's case. He may lay before the jury by hypothetical questions scien-

tific inferences properly deducible from the facts supported by his evidence. The form of such questions is generally within the discretion of the trial court" (citing numerous Oregon decisions). Carruthers v. Phillips, 169 Or. 636, 645, 131 P. 2d 193.

[fol. 66] Judged by the standard thus fixed, the question objected to was a fair question, and the objection was properly overruled.

During the cross-examination of Dr. Williams, counsel for the defendant quoted from the writing of a number of recognized authorities on diseases of the mind. On redirect examination the district attorney asked:

> "Doctor, after hearing all these texts counsel has read and your discussion with him, is there anything that has been read or said that is in conflict with your original opinion that Morris Leland has the ability to distinguish between right and wrong, and premeditate and deliberate?"

Counsel for the defendant objected on the grounds that the question called for the conclusion of the witness and was not a proper hypothetical question because it did not include all the facts of the case. The court overruled the objection, and the witness answered in the negative. The question was not in fact hypothetical because it did not assume the truth of anything, but was merely an inquiry as to whether the doctor's opinion, expressed on direct examination, that the defendant was able to distinguish between right and wrong, and able to premeditate and deliberate, was in conflict with anything "read or said" during the cross-examination. The question was objectionable, however, because not even an expert would be the judge of whether such conflict existed. That was exclusively for the jury. We think that the district attorney intended to ask whether anything brought out on the cross-examination had caused the witness to change his opinion, and that the witness probably so understood the question. Whether this be so or not, the ruling, in our opinion, did not constitute reversible error.

[fol. 67] Upon the conclusion of the taking of testimony and before the closing arguments began, counsel for the

defendant requested the court to instruct the jury "that they are not to permit this gruesomeness of this evidence to be allowed—their passion to be aroused by the District Attorney's comment." The court said:

> "When the jurors were being interrogated on voir dire they were told to disregard passion, prejudice and sympathy, and I shall repeat that in my instructions to them. Otherwise, I will deny the motion."

The ruling is assigned as error. It was entirely discretionary with the court to determine whether such an instruction should be given at that time. It appears that during the testimony of Dr. Snedden the court interrupted to instruct the jury at some length, with particular reference to the photograph of the corpse, against allowing their judgment to be controlled by sympathy, passion or prejudice. Similar instructions were given in the charge at the close of the case. These admonitions, we think, sufficed. The court is not required to caution the jury to do their duty and to warn them against improper influences every time counsel makes such a demand.

It is claimed that the court erred in failing to grant the motion of defendant's counsel to withdraw from the consideration of the jury the question of first degree murder on the ground that there was no proof beyond a reasonable doubt of deliberation and premeditation and malice. In support of this assignment of error counsel point to certain portions of the testimony of the psychiatrists regarding the defendant's mental condition. But, besides the fact that the experts disagreed among themselves, the jury were [fol. 68] not bound by their opinions. In re Faling Will, 105 Or. 365, 449, 208 P. 715; 32 C. J. S., Evidence, 402, § 569 h. It was the province of the jury to determine the questions of premeditation and deliberation and malice from all the evidence in the case, some of which was decidedly in conflict with the expert testimony to the effect that the defendant was incapable of premeditating. It has been held by this court that premeditation and deliberation are always questions for the jury. State v. Butchek, supra, 121 Or. 159.

Assignment of Error No. 20 leaves something to be de-

sired as a compliance with the rules of this court respecting the preparation of briefs. It includes alleged errors in the court's failure to give twenty-six requested instructions and in giving some four printed pages of instructions. The exception to the instructions given, which relate to the defense of insanity, is not set forth in the brief as the rules require. The transcript, however, shows that the sole exception taken to the instructions was the following:

> "Mr. Ryan: I have one exception; I want it to show on the record in this case that we except to the instruction that insanity must be proven beyond a reasonable doubt, on the ground and for the reason that it deprives the defendant of due process of law under the United States Constitution."

The instructions upon the subject of insanity are substantially the same as those which we approved in State v. Garver, supra, following earlier precedents in this state. We are now once again asked to hold unconstitutional the Oregon statute, § 23-122, O. C. L. A., which casts upon the defendant the burden of proving the defense of insanity [fol. 69] beyond a reasonable doubt, and to overrule the recent decision in State v. Grieco, supra, which rejected that contention. We are also again urged to abandon the so-called "right or wrong" test of insanity and adopt the rule of "irresistible impulse". In State v. Garver we reexamined that question and reached the conclusion that, even though we thought it desirable, we could not, in the face of § 23-122, O. C. L. A., abandon the rule of our decisions, that insanity as a defense to crime is a disease of the mind which renders the person incapable of understanding the nature, quality and consequences of his act, or of distinguishing between right and wrong in relation to such act. Nothing has been presented in this case upon this question not heretofore considered by us in the Garver case. We adhere to that decision. We have heretofore recognized the harshness of the legislation with regard to the burden of proof of insanity. State v. Garver, supra. But we are not convinced that the legislature could not constitutionally so provide, and feel bound to reaffirm the

holding of the Grieco case that § 23-122, O. C. L. A., does not offend against any constitutional guaranty. We find the instructions on insanity free from error, and particularly that the court was right in refusing to submit to the jury the question of "irresistible impulse" as the test of legal insanity.

We do not consider that we are under a duty to discuss separately all the numerous requested instructions brought together under this assignment of error. Apart from those having to do with the defense of insanity, various of the requests are grouped under headings, as follows: "impulsive acts of defendant", "premeditation and deliberation", [fol. 70] "willfulness", "abandonment of intention", and "miscellaneous". The charge of the court covered completely and carefully all phases of the law of homicide applicable under the evidence. Many of these requested instructions deal with deliberation and premeditation. The court instructed at length on these subjects, and, as no exceptions, other than as already noted, were taken to the instructions, and no criticism of any of them is made in the defendant's brief, we take it that counsel for defendant concede their correctness. Yet, without any argument to support the position, we are asked to hold that the court should have given instructions on these subjects in the language of counsel instead of the language actually chosen. A comparison of all the requested instructions with the charge of the court justifies the conclusion that the substance of all the requests which correctly state the law was given in the court's charge, and hence there was no error in declining to adopt these requested instructions.

As to the remaining requests, the only ones which, in our opinion, call for particular mention are the following:

By two requested instructions, which fall under the heading in the brief "abandonment of intention", counsel for defendant would have had the court instruct the jury in effect that, if they found that the defendant deliberated and premeditated and planned, and then abandoned the plan and later, not in pursuance of the plan or deliberation or premeditation but acting hastily upon the moment, killed the deceased, then he would not be guilty of murder

in the first degree. In support of the claim of error, counsel cite 15 Am. Jur., Criminal Law, 22, § 328; United States [fol. 70a] v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 S. Ct. 531; State v. Webb, 216 Mo. 378, 115 S. W. 998, 129 Am. St. Rep. 518, 20 L. R. A. (n. s.) 1142. The rule of these authorities is stated in American Jurisprudence as follows: "There is in every design or plan to commit a crime a place of repentance or locus penitentiae whereby the one planning to commit it may abandon the idea and thus avoid criminal liability." The text further says: "It is obvious, however, that where the crime is consummated, there is no field for an application of the doctrine." The principle was applied in State v. Webb, supra, which holds that, where the defendant and another entered into a suicide pact, it was a good defense to show that the defendant abandoned his purpose of committing suicide and also endeavored to persuade the other party to the pact, who killed herself, to abandon it. The requested instructions were properly refused because the rule they involve has no application whatever to this case. Here the crime was consummated. The defendant killed the girl. If he did so willfully and purposely, with premeditation, deliberation, and malice, he was guilty of first degree murder; otherwise he was not. The court instructed the jury:

> "If the mind fully and calmly forms a design to kill *and the act is committed pursuant to such design*, then it is premeditated, no matter how short or how long an interval of time may elapse before such design is executed." (Italics added.)
>
> "In order to find the defendant guilty of murder in the first degree, you must find that he killed the deceased *as the result of a deliberate and premeditated act, in pursuance of a design formed and matured by him* when he was the master of his own understanding, and after he had had the time and opportunity for deliberate thought." (Italics added.)
>
> "* * * It is necessary that the deliberation and premeditation result in a complete and specific intention to commit an act and it must be formed in the defendant's mind *so that he acts upon it*." (Italics added.)

[fol. 71] Thus, the court plainly told the jury that, before they could find that the crime was premeditated, they must find that it was committed pursuant to a design previously formed. The jury could not, under these instructions, find the defendant guilty of first degree murder if they believed that he had, at the time of the killing, abandoned such a design.

Another of such requested instructions is the following: "I instruct you that if you believe the defendant killed the decedent in the manner stated in the confession, to-wit: "It just came to me' (snapping fingers) 'just the second she started screaming,' then you cannot find the defendant guilty of murder in the first degree." We have already recounted the circumstances of the crime to which the quoted statement of the defendant relates. No authority has been cited for the propriety of such an instruction, and we are confident that none can be found. For the court to have given it would have been a gross usurpation of the jury's function to determine the effect of the evidence and the questions of deliberation and premeditation.

Assignment of Error No. 20 and all its numerous parts are without merit.

The following occurred during the argument of the deputy district attorney:

> "Mr. Carskadon: Now, Ladies and Gentlemen, when you are in the jury room, remember the State's silent witness in this case, Thelma Taylor. She is here. Her picture is making the argument to you on the ground of malice——
>
> "Mr. Ryan: (interrupting) If the court please, I object to that.
>
> "The Court: I will sustain the objection to the form of the argument."

[fol. 72] This was followed by a motion for a mistrial, which the court denied in the following language:

> "Let the record show the court feels the immediate occasion for the motion for mistrial was the District Attorney's reference to 'the silent witness.' Objection was immediately made by counsel for the defense and the objection was sustained. Counsel has been in-

structed to no longer pursue that type of argument. The motion will be denied."

The argument was not particularly inflammatory, but it might have become so had it continued along the same lines, and we think the court did well to put a prompt stop to it. The ruling had the effect of forestalling any prejudice that might otherwise have resulted. There was no abuse of discretion in denying the motion for a mistrial.

The judgment is affirmed.

[fols. 73-74] Citation in usual form showing service on John B. McCourt omitted in printing.

[fol. 75] IN SUPREME COURT OF OREGON

Appeal from Multnomah County

STATE OF OREGON, Respondent,

vs.

MORRIS LELAND, Appellant

JUDGMENT—February 7, 1951

This cause on October 4, 1950, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter a judgment in accordance herewith.

[fol. 76] Clerk's Certificate to foregoing paper omitted in printing.

To the Circuit Court of the State of Oregon,

For the County of Multnomah

You are hereby commanded that of the above judgment order of our Supreme Court you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Supreme Court, and to law and justice shall appertain.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, March 5, 1951.

Arthur S. Benson, Clerk of Supreme Court, State of Oregon. (Seal.)

[fol. 77] In the Supreme Court of Oregon

[File endorsement omitted.]

[Title omitted]

Petition for Rehearing—Filed February 26, 1951

Comes now the appellant herein and respectfully petitions the Court for a rehearing on the decision filed the 7th day of February, 1951, and in support thereof shows as follows:

I

The Court erred in refusing to allow a reversal on the basis of appellant's assignment of error number II. We sincerely state that our lack of information concerning the confession seriously hindered our defense and prevented a fair trial.

In reading the decision entered in this case, we are impressed that the Court was struggling to find an excuse for not allowing a reversal of the decision based on this assignment of error. We will not here review the authorities cited in our brief. Suffice it to say that our analysis of the decision of the Court leads us to believe, that although convinced by the rationale of our argument, the

Court excused the error assigned in this assignment of error on the basis that it was a matter of discretion with the lower Court. Let us see how this discretion was used.

We refer the Court to the Transcript of Testimony, page 7 where we find this language used by the Court below: "I know of no rule of law that would justify an order such as you are seeking, that would require the District Attorney to turn over to you a portion of the evidence on which he proposes to rely, * * *" The Court did not even look at the confession but merely dismissed the matter because we could point to "no rule of law".

A Court cannot use discretion unless, at least considering that a life is involved, it reads the instrument in issue. In this case the Court thought that the document in question was not worthy of this slight attention.

[fol. 78] This is a petition for rehearing, we will not labor the problem presented in this petition further. Hard cases make bad law. This State has deviated from the principles set down in McMabb vs. U. S., 318 US 332, and while our deviation may or may not be justified, it is only fair to allow the defendant the protection of seeing the confession he made if we allow police the broad questioning rights they have under our law.

The Court has indicated that it did not feel that the error assigned was prejudicial. If we had been forearmed with the knowledge of the statement made by the defendant, we would have stressed in our opening statement that defendant's decision was made in the time it took to snap a finger. We would have intelligently cross-examined the officers called by the State with respect to this crucial circumstance. Further, we would have gone over the matter with Dr. Dixon with some chance to study it with him in contrast to the few minutes allotted to us just prior to his testimony and in the confusion of the trial of the case. Access to view this confession would have shifted the whole plan of our case, yet was denied to us by the Court. Thus the defense was prejudiced and made the victim of surprise. Therein was the prejudicial nature of the lower court's decision. Although the Court may feel "That any other verdict than the one of guilty would have been a shocking miscarriage of justice", it does not change the fact that the defendant did not have a fair trial.

II

The other assignments of error were brought to this Court's attention in the utmost of good faith. It was felt that the issue was resolved on a point determined by enraged emotion rather than as an issue of cold fact. We do not seek to avoid the terrible consequences of an act impelled by a morbid propensity for wrong, but we do vehemently question the moral and legal right of the State to assign fault to those who are inherently unable to act on the premise of right and wrong. Our positions are summed up quite succinctly in the following proposition: "Would Morris Leland commit this crime because he was a morally wrong individual or because he was injured on the head when he was six years of age?" The legislative body of this State has no right to deny the substance of [fol. 79] due process. We have called the attention of the Court to the unconstitutional decision which you have rendered. The substance of our argument cannot be avoided by excuses or substitution of responsibility. We ask that a rehearing be granted and that a constitutional law regarding insanity be proclaimed by this Court. Without waiving any of the other questions raised in our brief we respectfully request that a rehearing be granted and that the decision herein before rendered by the Circuit Court of Mul-nomach County be reversed and the matter be remanded for a new trial.

s/d Anthony Pelay, Ryan & Pelay.

Duly sworn to by Anthony Pelay, Jr. Jurat omitted in printing.

[fol. 80] In Supreme Court of Oregon

[Title omitted]

Order Denying Rehearing—February 28, 1951.

The court having fully considered the appellant's petition for rehearing in this cause, and now being fully advised in the matter, it is hereby ordered that said petition be denied.

[fol. 81] IN THE CIRCUIT COURT OF THE STATE OF OREGON,
FOR THE COUNTY OF MULTNOMAH

[File endorsement omitted.]

THE STATE OF OREGON,

vs.

MORRIS LELAND, Defendant

INDICTMENT FOR VIOLATION OF SECTION 23-401, O. C. L. A.
C 28630—Filed August 18, 1949

Morris Leland is accused by the Grand Jury of the County of Multnomah and State of Oregon, by this indictment of the crime of Murder—in the First Degree committed as follows:

The said Morris Leland on the 6th day of August, A. D. 1949, in the County of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously, purposely and of deliberate and premeditated malice, kill one Thelma A. Taylor by beating the said Thelma A. Taylor with an iron bar and by stabbing the said Thelma A. Taylor with a knife, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the County aforesaid, this 18th day of August, A. D. 1949.

Witnesses examined before the Grand Jury: Vernon Nicholson, Ernest W. Thompson, Dan J. Mitola, Vinton Sneedon.

John B. McCourt, District Attorney; By J. Raymond Carskadon, Deputy.

[fol. 82] Indictment, _____ a True Bill, W. E. Lindsay, Foreman of the Grand Jury.

STATE OF OREGON,
County of Multnomah, ss.

The within defendant named may be admitted to bail in the sum of $_____.

Let a warrant issue.

Frank J. Lonergan, Circuit Judge.

[fol. 83] IN THE CIRCUIT COURT OF THE STATE OF OREGON

[Title omitted]

MOTION TO POSTPONE TRIAL—Filed September 8, 1949

Comes now Ryan & Pelay, attorneys for defendant herein, and moves this Court for an Order postponing the trial of this case for 90 days from the date set, to-wit: September 22nd on the grounds and for the reason that

1. Defendant will need additional time to prepare the case, and to have proper psychiatric examination and study.

2. That the case was given greater publicity by one of the Portland newspapers than any similar case has received, and that said publicity painted a lurid picture of the crime and misconstrued and exaggerated many of the facts of the crime, and that defendant received such public notice and infamy as a result thereof, that it would be impossible for the defendant to receive a fair trial at this time with said facts so impressed in the public mind, and in order to accord defendant due process of law and a fair and orderly trial, and in order to promote justice, defendant is entitled to a postponement of 90 days from the date of the trial.

3. Defendant's counsel has one case set in the Supreme Court which will be heard in the coming month, and the following cases are set in the Circuit Court which will be heard on the following dates:

State vs. Irby, September 19th, Van Riper vs. Van Riper, September 12th, Travelers Ins. Co. vs. Kadderly, September 23rd, Gardner vs. Natl Casualty Co., September 26th, Nystrom vs. Kercher, October 3rd Verhoef vs. Kercher, October 14th, Commerce Invest., Inc. vs. Eckholm et ux, October 28th.

That in addition thereto defendant's counsel has three [fol. 84] cases which should be tried in the District Court in Multnomah County during the month of October and a considerable press of office business, and that the majority of the foregoing cases will not be settled.

Due service of foregoing Motion is hereby accepted this 8 day of Sept. 1949.

/s/ Anthony Pelay, Jr., Of Attorneys for Defendant; /s/ Grace L. Bottler, Deputy Dist. Attorney for Mult. Co. (Seal.)

[File endorsement omitted.]

[fol. 85] IN THE CIRCUIT COURT OF THE STATE OF OREGON

[Title omitted]

MOTION TO POSTPONE TRIAL—Filed October 12, 1949

Comes now Ryan & Pelay, attorneys for defendant herein, and moves this Court for an Order postponing the trial of this case for 60 days from the date set, to-wit: October 24, 1949, on the grounds and for the reason that:

1. Defendant will need additional time to prepare the case, and to have proper psychiatric examination and study. Further, defendant needs more time in which to obtain the medical records from the Veterans Administration and other pertinent data concerning defendant's medical and psychiatric record. That the psychiatrist employed by defendant wants additional time for investigation and examination and will not be ready to adequately testify concerning defendant's condition on the date set for trial herein. That the failure to grant said extension of time will deprive defendant of due process of law.

2. That the case was given greater publicity by one of the Portland newspapers than any similar case has received, and that said publicity painted a lurid picture of the crime and misconstrued and exaggerated many of the facts of the crime, and that defendant received such public notice and infamy as a result thereof, that it would be impossible for the defendant to receive a fair trial at this time with said facts so impressed in the public mind, and in order to accord defendant due process of law and a fair [fol. 86] and orderly trial, and in order to promote jus-

tice, defendant is entitled to a postponement of an additional 60 days from the date of the trial.

/s/ Anthony Pelay, Jr., Of Attorneys for Defendant.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, is hereby accepted in Multnomah County, Oregon, on this 12th day of October, 1949.

John B. McCourt, District Attorney for Multnomah County, Oregon, By: /s/ John R. Collier, Deputy.
(Seal.)

[File endorsement omitted.]

[fol. 87] IN THE CIRCUIT COURT OF THE STATE OF OREGON

[Title omitted]

MOTION FOR EXAMINATION OF CONFESSION—Filed November 18, 1949

Comes now the defendant, by and through his attorneys, Ryan & Pelay, and moves the Court for an order requiring the District Attorney to disclose and make available to Ryan & Pelay the alleged confession of the defendant and all records pertaining to the death of Thelma A. Taylor taken by the Coronor's Office.

Ryan & Pelay, By /s/ T. H. Ryan.

Service accepted Oct. 21, 1949.

/s/ John B. McCourt, Dist. Atty. for Mult. Co., By /s/ J. Raymond Carskadon, Deputy.

[File endorsement omitted.]

[fol. 88] [File endorsement omitted.]

IN THE CIRCUIT COURT OF THE STATE OF OREGON

[Title omitted]

VERDICT—Filed November 9, 1949

We, the jury duly empaneled and sworn in the above entitled court and cause, find the defendant Morris Leland, Guilty as charged in the indictment.

Jeffery Christie, Foreman.

[fol. 89] IN THE CIRCUIT COURT OF THE STATE OF OREGON

THE STATE OF OREGON,

vs.

MORRIS LELAND, Defendant

JUDGMENT ORDER—November 14, 1949

Now at this time into open court comes the State of Oregon by John B. McCourt, District Attorney, John R. Collier and J. Raymond Carskadon, deputy district attorneys, and the above named defendant, Morris Leland, appearing in person in custody of the sheriff and with his attorneys Thos. H. Ryan and Anthony Pelay, Jr., this being the time heretofore fixed by the court for the pronouncing of judgment in this case; and

It appearing to the court that heretofore, to-wit, on the 18th day of August, 1949, the said defendant, Morris Leland, was duly indicted by the grand jury of Multnomah County, Oregon, for the crime of Murder in the First Degree, committed in said county and state on the 6th day of August 1949, and thereafterwards the said defendant was arraigned upon said indictment, and thereafterwards on the 19th day of August, 1949, the said defendant entered a plea of not guilty of the crime charged in the indictment; and

It appearing further that on the 30th day of August, 1949, a notice, motion and order was filed herein by attor-

neys for said defendant wherein the defendant pleaded not guilty by reason of insanity; and

It further appearing to the court that on the 9th day of November, 1949, the said defendant was duly convicted on said indictment of the crime of Murder in the First Degree as charged in said indictment by the verdict of a jury empaneled and sworn, and that the said jury did not in its verdict recommend life imprisonment, all as appears of record in this court and cause; and

The court having at this time asked said defendant if he had any reason to show why sentence should not now be pronounced upon him, and said defendant showing no good cause, therefore

[fol. 90] It is now considered, ordered and adjudged that the said defendant, Morris Leland, be forthwith remanded to the Sheriff of Multnomah County, Oregon, and that within twenty days from this date the said sheriff shall deliver the said defendant, Morris Leland, to the warden of the Penitentiary of the State of Oregon for execution, and that said defendant shall thereupon be confined within the walls of the said penitentiary until the date of the execution, and that within the enclosure of said Penitentiary of the State of Oregon, on the 6th day of January, 1950, in the manner and under the conditions provided by law, the punishment be inflicted upon said defendant, Morris Leland, by the superintendent or one of the wardens of said penitentiary by administering lethal gas to said defendant, Morris Leland, until he, the said defendant, Morris Leland, be dead.

Dated November 14, 1949.

James W. Crawford, Judge.

[fol. 91] In the Circuit Court of the State of Oregon

[Title omitted]

Motion for New Trial—December 14, 1949

Comes now the defendant, Morris Leland, appearing by and through his Attorneys, Ryan & Pelay, and respectfully moves the Court for an order setting aside the judgment

heretofore entered on or about the 14th day of December, 1949, and granting the defendant a new trial, for the following reasons and upon the following grounds:

1. Court erred in refusing to permit extension of time for the trial of this case, moved for by the defendant, in the two preliminary motions entered of record in this case.

2. Court erred in refusing to grant a mistrial upon the motion of defendant's attorneys when an explanation was made by the Court in answering a juror's question whether or not a life sentence would mean a life sentence, wherein the Court explained to the juror the Parole Board had a right to consider defendant's case for parole.

3. Court erred in refusing to grant a mistrial based on the questions and comment made by the District Attorney to the juror mentioned in paragraph (2) hereof with reference to parole of defendant in the event of a life sentence.

4. Error of Court in permitting witnesses to answer questions by the District Attorney with reference to whether the defendant was legally insane or knew the difference between right and wrong on the ground and for the reason that the same constituted an invasion of the province of the jury.

5. Error of court in permitting the introduction of evidence of a grewsome nature, the evidence being introduced solely for that purpose and used by the District Attorney to arouse the passion and prejudice of the jury, with particular reference to State exhibits' Nos. .....

[fol. 92] 6. Error of court in permitting Dr. Evans to answer questions by District Attorney which was not in proper hypothetical form, as it did not include a full statement of the facts of the case.

7. Refusal of the Court to grant a mistrial upon improper conduct of the District Attorney in argument in commenting on State's exhibit No. 14, in such a manner as to arouse the passion and prejudice of the jury when State's exhibit No. ..... was exhibited for the sole purpose of arousing the passion and prejudice of the jury.

8. Error permitted by improper conduct of Mrs. Taylor, witness for the State, and mother of deceased, which conduct did not come to the attention of defendants' counsel until after it had taken place, and which consisted of the

witness turning around as she left the court room and dramatically staring at the defendant in an angry manner; said witness having no real purpose in proving the facts of the case, and was introduced in the trial of the case merely to arouse the passion and prejudice of the jury.

9. Insufficiency of evidence to justify a verdict of murder in the first degree.

10. Failure of the Court to give defendant's requested instruction No. 55.

11. Deprivation of defendant's right to due process of law in the trial in this case by instructing the jury that insanity must be proved beyond a reasonable doubt.

12. The foregoing motion is based upon the records and files in the case herein, and upon the criminal code of the State of Oregon, the constitution of the State of Oregon and the United States of America. Particular reference will be made to the violation of Article XIV of the Constitution in failing to grant defendant due process of law; refusal to grant defendant a fair and impartial trial; and, there was an error in law and an abuse of discretion by the Court in failing to grant mistrials as requested and above outlined, and in admitting evidence as above outlined.

It will be further contended there is no evidence from which the jury could find beyond a reasonable doubt there was deliberation and premeditation of the offense charged in the indictment, but on the contrary, the witness for the [fol. 93] State testified that it was difficult, if not impossible, for the defendant to premeditate and deliberate. Particular reference is made to the evidence of Dr. Evans. It is further contended the State is bound by the testimony of its own witnesses.

It will be further contended that there is evidence in the case that defendant abandoned any premeditation, if evidence of such existed, at the time of the killing, and the Court erred in refusing to instruct thereon in defendant's requested instruction No. 55. JWC

Dated at Portland, Oregon, this day of December, 1959.

Ryan and Pelay, T. H. Ryan, Attorneys for Morris Leland.

Proof of service (omitted in printing).

[fol. 94] IN THE SUPREME COURT OF OREGON

[File endorsement omitted.]

PRAECIPE—Filed May 24, 1951

To the Clerk of the Supreme Court of the State of Oregon:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Indictment.
2. Motions for Continuance of Trial Date.
3. Motion for Examination of Confession of Defendant.
4. Transcript of Records, Page 1 to 503, inclusive.
5. Plaintiff's exhibits number 1, 3, 4, 14, 15, and 18; Defendant's exhibits 19, 20, 22, 22A and 23.
6. Verdict.
7. Motion for New Trial, and Order Denying New Trial.
8. Judgment of Conviction and Death Warrant.
9. Briefs on Appeal to the Supreme Court of the State of Oregon, both Appellant's and Respondent's.
10. Opinion of the Supreme Court of the State of Oregon; Petition for rehearing and Order denying petition.
11. Petition for Appeal.
12. Order Allowing Appeal.
13. Citation on Appeal.
14. Assignment of Errors.
15. Statement of Jurisdiction of the Supreme Court of the United States.
16. Statement of Defendant Appellant Directing Attention to Paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.
17. Certificate of Service of Notice of Appeal.

[fol. 95] 18. Affidavit to Proceed in Forma Pauperis.
19. Petition to Proceed in Forma Pauperis.
20. This Praecipe.

/s/ Howard F. Latourette, Counsel for Appellant,
/s/ Ryan & Pelay, Of Counsel.

[fol. 96] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1-4] IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. C-28630

THE STATE OF OREGON,

vs.

MORRIS LELAND, Defendant

Transcript of Testimony, etc

Be it remembered that heretofore, to-wit, on Thursday, October 27, 1949, at the hour of 9:30 o'clock A. M., the above entitled cause came on regularly to be heard before the Hon. James W. Crawford, Judge and a jury;

The State of Oregon appearing by John R. Collier, Chief Deputy District Attorney, and J. Raymond Carskadon, Deputy District Attorney;

Defendant appearing by Thomas H. Ryan and Anthony Pelay, Jr., his attorneys; and thereupon the following proceedings were had in said cause, to-wit:

(The following proceedings were had in chambers, prior to the selection of a jury.)

[fol. 5] MOTION FOR PERMISSION TO EXAMINE THE CONFESSION

Mr. Ryan: Prior to the assignment of this case to your Honor—I think it was Friday of last week or Monday of this week—I served upon the District Attorney's office a motion to produce certain evidence which they have in the case, in particular the autopsy report, or coroner's report, which was given to me, and also the alleged confession of the defendant. They refused to make available to me the alleged confession of the defendant.

At this time I ask the court to issue an order permitting me to examine the confession of the defendant, before this case gets under way. We can go ahead with the jury. I only want to read it over. And I base that motion on

the following grounds and reasons: First, in order to determine whether or not the statement made by the defendant is a rational statement, or an accurate statement, of the facts as he has related them to me. I would like to go over it and see what he had stated. It is testimony taken by the police before the defendant had counsel, before he was advised of his rights, and it was taken before he was given a preliminary hearing before a magistrate as provided by law. In the trial of this case I intend to attack the validity of the confession as regards the formalities of taking it. However, the defense in this case being such as it is, a dual defense of not guilty, I put into issue the whole facts of the case and the defense of insanity. I believe that in justice to the defendant, that ought to be made available to us. It is my contention that a confession is not evidence in the sense that it was something that the prosecution has and they can refuse to make available [fol. 6] to the defendant. It is evidence given by him, whether properly or improperly, and then after counsel has been appointed to defend the party, it should be available to him. He was given no copy of it, he doesn't know what he said, and I think it is only fair that I be apprised of what it says and be given an opportunity to examine the same before the trial gets under way.

Mr. Collier: If your Honor please, the confession is the private property of the officers and District Attorney. It is not a public record in any sense of the word. The coroner's report, we think, probably was a public record, and we have handed it to the defense attorney, Mr. Ryan. And as I say, the confession is the private property of the District Attorney and is not a public record, and I don't think the court has the discretion to require that it be shown to the defendant.

Mr. Ryan: I think that the first phrase, asserting that the confession is private property, is erroneous. The confession was taken, if it was taken properly, was taken just as much in the course of the duties of the police officers and the District Attorney's office as was the coroner's statement and autopsy report. I don't see why there is any property right in it at all. If anything, it is the private property of the defendant, if it is anybody's private prop-

erty. And he has made a statement and it was taken from him before he was advised of his rights, before he had counsel. Now, I think the question of taking a confession—I realize the police in many cases would not be in a position to prosecute if confessions were not taken. However, the court is familiar with the McNab case and other cases [fol. 7] with regard to the care and protection that should be given to the defendant when he gives a confession. I think this falls under the line of that, so that we can examine somebody and have it made known to us before we go into court and make a motion with regard to the confession.

Now, I would say this: Had I been present he either would not have made the statement, or probably would not have made the statement, or at least I would have had a copy of the statement. That would be the least.

Now, if we are going to permit the District Attorney to take a young man who is not advised of his rights, and then take a statement, and then say "You can't see what you said," I think it is a violation of any fundamental principle of justice which you can imagine, and particularly so, particularly so, when there is serious question as to his mentality.

MOTION DENIED

The Court: You propose to challenge the sufficiency and the competency of the so-called confession. That, of course, will be considered in due course. Presently, we don't know whether the confession is competent evidence or not. At the proper time, that will be determined.

I know of no rule of law that would justify an order such as you are seeking, that would require the District Attorney to turn over to you a portion of the evidence on which he proposes to rely, in advance, at any rate, of any determination being made that this alleged evidence will be received as competent and material. The McNab case, and the other arguments that you make, Mr. Ryan, would be addressed very largely to the sufficiency of the confession and the circumstances under which it was taken, as [fols. 8-27] justifying its submission as evidence. There is no statute in this state, so far as I know, that would authorize an order of this kind. I will deny the motion.

Mr. Ryan: I would like the record to show that I have asked for an exception to both the motions.

The Court: Of course, exception follows under the statute. It is unnecessary to take any exceptions.

Mr. Ryan: On motions likewise?

The Court: Oh, yes. However, in the interest of caution you may do so, if you wish, as we go along, and I will allow an exception in each case.

Mr. Collier: I want to say that there was at this time nothing before the court which the court could pass on. There was no confession offered in evidence at this time; therefore, there was nothing before the court to pass on. And while that is so, the statement was made by Mr. Ryan that the defendant was not cautioned as to his rights. I want to state for the record solely, that the defendant was fully advised as to his rights before he said a word.

The Court: Very well, gentlemen.

[fols. 28-32] Renewal of Motion by Mr. Ryan for Permission to Examine the Confession and Denial

Mr. Ryan: At this time we again renew our motion for permission to see the confession before making the opening statement, the alleged confession.

The Court: For permission to see the alleged confession before making your opening statement? I will deny the application and will say, of course, if the confession is challenged, we will retire to chambers and have a complete hearing concerning the circumstances under which the alleged confession was given.

[fols. 33-37] Excerpts from Opening Statement of Mr. Ryan

Mr. Ryan: Ladies and Gentlemen, in a case of this kind the defendant's attorney is at a particular disadvantage by virtue of the fact that the evidence in a case of this type is entirely in the hands of the District Attorney's office. We have made request to the District Attorney's office per-

sonally, we made a request before the court here before the trial started the other day, and we renewed that request this morning——

Mr. Collier: Just a minute, your Honor——

The Court: Mr. Ryan, your statement is objectionable. Matters addressed to the court are no concern of the jury. It is the court's responsibility. I say, of no concern to the jury, except as matters might later be presented to the jury in some form or manner. You may proceed.

Mr. Ryan: I am trying to say, Ladies and Gentlemen of the Jury, we don't know what Morris Leland stated to the police officers or stated in his confession. These facts [fols. 38-39] will be brought before you as well as we are able to. As I stated, I don't have the confession and my client is not, I think the evidence will show, fully capable to act in his own defense, but I think the facts as Mr. Collier stated them are somewhat true.

[fol. 40] Dan J. Mitola, called as a witness on behalf of the State of Oregon, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Collier:

Q. Now, Mr. Mitola, the acoustics in this room are not as good as they might be, and if you would direct your testimony down here to the two end jurors, I am quite sure then everybody can hear. Now, your name is Dan J. Mitola?

A. That is right.

Q. Your occupation is what?

A. Sergeant of detectives.

Q. How long have you been such?

A. Approximately five years.

Q. Now, I call your attention to the date of August 11th. State to the jury whether or not you received a call to come in to the jail.

A. My partner and I were in the prowl car patrolling the West Side district, downtown Portland, at 2:07 A. M.

that morning. We received a call by radio to return to the jail immediately.

Q. And when you arrived there, who did you see?

A. We met Sergeant Wiles, who is in charge of the jail, who happened to be in charge of the jail on that particular night, on that shift, and he immediately informed us that——

Q. Well, now, wait a minute: Who else was there?

A. Sergeant Wiles, we met him. The jail is on the fifth floor of the police station, and Sergeant Wiles was on the street floor waiting for us.

Q. What he said to you at that time would be hearsay, [fol. 41] but you did have a conversation with him?

A. Yes.

Q. And after that conversation, what did you do?

A. We went to the jail. My partner and I—Detective Eck was with me at the time—we both went up to the jail.

Q. Who did you see there?

A. Morris Leland.

Q. Is Morris Leland in the court room?

A. Yes.

Q. Where is he?

A. Sitting right there (indicating).

Q. Did you talk with him?

A. Yes.

Q. Would you go ahead and outline to the jury what he told you?

A. He stated that he wished to tell us about a crime which he had committed the week prior, and I asked him what it was and he said——

Mr. Ryan: If the court please, I object to any statement as to what he said there. There is nothing before the jury that the defendant was informed of his constitutional rights and I think his statement at this time would be a form of confession. He was not protected in the manner in which the confession was taken.

The Court: You are not referring to the confession at this time, are you?

Mr. Collier: Well, your Honor, I am leading up to what he said to the officer concerning the matter that we are now trying. I am endeavoring to get the details of what

led up to it so that from those details a finding of volun-
[fol. 42] tariness and so forth may be found.

The Court: What about the objection that Mr. Ryan raised, that he was not advised of his constitutional rights?

Mr. Collier: The officer is in no way bound to advise anyone, in talking to him, of any constitutional rights whatsoever. When a man talks to a policeman he knows what he says is going to be used against him.

The Court: That applies to a magistrate?

Mr. Collier: Yes; that only applies to a magistrate.

The Court: I will overrule the objection. You may proceed.

Mr. Collier: If counsel wishes a hearing in chambers, I have no objection.

The Court: He hasn't asked for it.

Mr. Ryan: I would like to have a hearing on this so it will be in the record. If you want to do this, in order to save time, I will be glad to have a hearing of the whole thing at one time.

Mr. Collier: It won't work out that way.

Mr. Ryan: I am not trying to delay this trial, but it is my opinion that his rights have been violated here.

The Court: What are you asking a hearing for right now?

Mr. Ryan: Whether or not the defendant was advised of his constitutional rights and informed on that situation, and this evidence, if it was taken from him, would be used against him. The defendant has a right to know and we will—I think there is a law that requires that he be told that he has a right to counsel, has a right not to answer, and if he makes a statement it will be used against him.

[fol. 43] Mr. Collier: The court, I think, has passed on that virtually. The only question here, your Honor, is as to the voluntariness of it. Of course, we are going to determine that by the incidents leading up to it.

The Court: Well, so far as any conversation he had with the defendant is concerned, I see no reason why that should not be related. When it comes to any alleged confession——

Mr. Collier: It will lead up to it.

The Court: ——then we should hear in chambers the cir-

cumstances surrounding it, as you say this will lead up to it.

Mr. Collier: Yes. The officer I was intending to call as my first witness has just come into the court room and I would ask permission to recall the witness from the witness stand and put the other witness on.

Mr. Ryan: That is all right.

The Court: You may step down, officer.

Witness temporarily excused.

[fol. 44] CHESTER WILES, called as a witness on behalf of the State of Oregon, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Collier:

Q. Officer, keep your voice up, please, and talk to the two end jurors.

A. I have been hurrying quite a bit.

Q. Will you state your name?

A. Chester Wiles—W-i-l-e-s (spelling).

Q. What is your occupation?

A. Sergeant of police, assigned to the city jail division.

Q. Were you such on the 11th day of August this year?

A. Yes, sir.

Q. Now, at that time what were your hours of duty?

A. Eleven-thirty P. M. to seven-thirty A. M.

Q. Now, I direct your attention to the hour of approximately 2:00 o'clock in the morning of October 11th—August 11th—and ask you to state to the jury whether anybody was brought in to the jail?

A. Yes, there was.

Q. Who was it?

A. A young man named Morris Leland, or Leland Morris.

Q. Is he here in the court room?

A. The young man sitting there, (indicating), yes.

Q. Sitting between his attorneys, Pelay & Ryan?

A. Yes, sir.

Q. And, without any details, why was he brought in?

Mr. Ryan: I object to that, your Honor. I don't think [fol. 45] anything with reference to any reason of his arrest I don't think has any place in this trial, and it would tend to show some other act that is not properly before the jury.

The Court: I don't understand the purport of the inquiry. Read the question.

(The question was read.)

Mr. Collier: You see, if your Honor please, you can't——

The Court: Does he know why?

Mr. Collier: Yes.

The Court: I will overrule the objection. You may answer.

The Witness: *A.* Brought in on a charge of larceny of an automobile.

Mr. Collier: All right——

The Court: I will say to the jury that the defendant, or any one, is not on trial here for the larceny of an automobile. You understand that. All right.

Mr. Collier: Now, I want to say, for the purpose of the record, to the court and to the jury, the only purpose of that was to show what led up to it, so we won't have a hole in the story,——

Q. Now, did you have occasion to talk to him?

A. I was talking—the boy was being booked into the jail. I had seen him before and he entered into a conversation with me by asking me if he could talk to a homicide officer, and naturally I was interested in what he wanted to tell me——

Mr. Ryan: I can't hear you.

The Witness: I asked him what for. He says, "About a murder." Naturally I was interested in it. I said "What murder?"——

[fol. 46] Mr. Ryan: If the court please, at this time there is no evidence here that the defendant was advised of his constitutional rights; that anything that he might say to officer Wiles would be used against him; or of his right to counsel, or right to appear before a magistrate.

The Court: The same objection applies to the testimony proposed to be elicited from Sergeant Mitola——

Mr. Collier: That is right.

The Court: —and I take it the District Attorney feels that all of this testimony may be necessary in connection with the confession. I will hear you in chambers.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Collier: Read the last question.

(The question was read.)

Q. Let me ask you this, officer: Did you know prior to his coming into the jail, of any murder?

A. No, sir, I didn't.

Q. And was he the first one to start the conversation

Q. All right. Now—and have you given us up to that about the matter?

A. Yes, sir.

point all the detail that concerns his conversations?

A. Yes.

Q. All right. Now, what did he say to you?

A. I asked him about what murder? He said about a girl, about a 15-year-old girl that was a missing girl a week before that. He tried to fix the date. He wasn't positive but he thought about a week before that. And with that [fol. 47] I asked him, "Where is the body?" and "Who did it?" He said "I did,"—me, rather. I said "Where is the body?" And with that he described it in his own way, out toward Oregon shipyard, in St. Johns in a slough. And I am not positive whether I asked him if he would take us out. I think the question was asked, would he take us out? And during this time I had called Sergeant Mitola, who was in charge of the detective division at night, and in turn he took us out there.

Mr. Collier: That is enough on that. That will be the testimony as far as Mr. Wiles is concerned.

The Court: Any cross-examination?

Mr. Ryan: Q. Did you make any statement to him with regard to his rights, whether to tell anything or not?

A. I didn't ask him anything; he told me.

Q. Did you make any statement as to his rights?

A. No.

Q. Did you tell him he had a right to an attorney and a right not to say anything to you?

A. No, I didn't; because I didn't feel——

Q. You didn't?

A. No.

Mr. Ryan: I think that is all. I think here you have the basis on a situation—here this boy had no advice at all. He is up here before the court and the question of his sanity has been raised. That in itself would surround him with greater protection than the ordinary person. But even an ordinary person is entitled to know of his rights. To assume that a person knows his rights when talking to [fol. 48] a police officer is not the law. That is why the warning is given. That is the way the District Attorney's office, in taking statements, generally writes into the statement whether it is true or not that he has been advised of his rights to make the statement and that the statement will be used against him.

(The objection was argued to the Court)

The Court. I will overrule the objection.

Mr. Collier: I propose at this time to call Dan Mitola and show the circumstances surrounding what Mr. Leland, the defendant, told him, to make a showing whether it was voluntary and freely given. That is the only thing.

The Court: It doesn't seem to me there is any reason why you shouldn't do that at this time.

Mr. Ryan: I don't see where we would be waiving any right by doing so, and I am willing to expedite this matter, so long as——

The Court: You would waive no rights?

Mr. Ryan: That is right.

Mr. Collier: All right.

(Thereupon Dan J. Mitola, having been previously sworn, was questioned, as follows.)

[fol. 49] DAN J. MITOLA, having been previously sworn, further testified as follows, out of the presence and hearing of the jury:

Direct examination.

By Mr. Collier.

Mr. Collier: Now, Mr. Reporter, would you refer back to the last question and answer of Officer Mitola?

(The last question and partial answer thereto were read)

Mr. Collier: Go ahead.

A. He said he had killed a girl and I asked him where the girl was located, where the body was located. He said "It is out towards the Oregon shipyards past the St. Johns bridge." And I asked him "Can you take us out there and show us where the body is?" He said "Yes, I'll take you there but I won't look at the body." So I said "Do you know who the girl was?" Well, it was a girl reported missing. Her picture was in the paper. She had gone out to pick beans. So after getting this information we went to the detective office where I got a flashlight, a large battery light, so we could have better light than an ordinary flashlight, and contacted Officer Thompson in the Bureau of Identification so he could accompany us and take photographs, as we went down to Second and Oak and got in the cars.

Q. What time, about, was that, officer?

A. We got the call to return to the station at 2:07. It was approximately 2:30.

Q. All right. And did you—did he take you out to see the place?

A. Yes.

Q. Now, down there, did you talk to him at the scene of the crime?

[fol. 50] A. Yes.

Q. Just give the—what was said?

A. Well, when we were walking from the street where we had parked our cars, he directed us, he led the way, and when we got to this clump of trees he said, "It's in there," and pointed in the direction where the——

Q. Well, I mean did you talk to him about his participation in the crime?

A. Not at that time.

Q. All right. And then later on did you have, at the station, have occasion to talk to him?

A. Well, we talked while we were traveling back and forth in the car.

Q. Give the conversation.

A. At that time I asked him where he had met this girl. He said it was in the St. Johns business district on Fessenden street; and on the morning of August 5th, around four—between four and four-thirty in the morning. And I said "How did you approach her?" He said "I just walked up to her and struck up a conversation with her and she was willing to go with me." And from there they walked towards the St. Johns bridge down by the woolen mills, then along the river bank to this place in this clump of trees. And I asked him how he happened to pick this particular location, and he said "Well," he said, he had stayed there a couple of nights prior to that and had made a bed there with some blankets that he had obtained and these blankets were out of a car that had been prowled.

Mr. Ryan: I object to any reference to that car prowling. [fol. 51] The Court: I see no point in referring to the blankets as having been taken from a car.

Mr. Collier: It is part of his story, it is related to his story, that it is all an integral part of it and you can't do it without making holes here and there.

Mr. Ryan: I don't see that where he got the blankets would have any bearing.

Mr. Collier: It would be some corroboration if the statement was true.

The Court: Well, we will consider that later. Go ahead.

The Witness: A. (Continuing) And he used this—these blankets for a bed. I asked him what he had done all day Friday? "Oh, just walked up and down the bank and sat down on the blankets." And we had found a lunch bucket and I asked him if he had eaten anything. He said no, the girl had eaten the lunch that she had in her lunch bucket. And then I asked him if he had attempted to rape the girl and he told me and Eek that he hadn't. And he

said that that night, Friday night, he and the girl slept on this bed that he had made there, and he became somewhat worried because he had kept this girl away from home during the day and during the night, so that gave him the idea that he wanted to kill her. So next morning he woke and the girl awoke and at that time he and the girl walked down to the river bank where he picked up this iron bar, and then they both returned to the immediate area where this bed was located, and it was at this time that he struck her with the bar. He said at one time she raised one hand——

Mr. Collier: Q. Did he say anything about a freight train?

[fol. 52] A. No, he didn't. At this time she raised her arm to ward off the blow and he continued to strike her until she finally was unconscious, and then he stabbed her with the knife that he had in his possession. He described the knife as being a hunting knife——

Q. At that time did you have the knife?

A. No, we didn't have the knife or the iron bar. After having killed her, which he thought he had killed her, he put her in this—under this clump of trees where this bed was situated and covered her with this blanket, and then used driftwood to cover her again, over the blanket. Then he wandered around, sleeping in the woods and the grass, and he said at one time he had come down to the station.

Mr. Collier: All right. I think that is sufficient. All I really want to do is show the court the details leading up to the statement of his activities and participation in the crime.

Mr. Ryan: Q. Did you at any time advise him, during this time, that he didn't have to tell you anything?

A. No.

Q. Did you advise him as to his right to have an attorney or go before a magistrate?

A. No.

Q. Did you tell him that what he told you would be used against him?

A. No, sir.

Mr. Ryan: That is the same ground, your Honor.

The Court: I will overrule the objection.

Mr. Ryan: If the court please, at this time—I should [fols. 53-54] have asked at the time of making my opening statement that the witnesses be excluded from the court room. I overlooked that.

Mr. Collier: No objection.

The Court: Well, I suppose they may be kept in here.

Mr. Collier: They could be kept in the jury room.

The Court: We will be using the jury room all the time, off and on; I think in here for the time being, and I will so advise them when we go out there again. Have you any further testimony you wish to offer with respect to this particular matter?

Mr. Collier: I will, later.

Mr. Ryan: No,—one question I will ask Mr. Mitola,——

Q. What time was it that you went down there, by the time you got to St. Johns?

A. We arrived at the scene at 3:00 A. M. in the morning.

Q. Was it dark?

A. Yes.

Mr. Ryan: That is all.

[fol. 55] TESTIMONY OF CHESTER WILES (resumed)

Mr. Collier: Mr. Reporter, will you read the last question and answer of officer Wiles?

The Reporter: (reading) —Q. Now, did you have occasion to talk to him? A. I was talking—the boy was being booked into the jail. I had seen him before and he entered into a conversation with me by asking me if he could talk to a homicide officer, and naturally I was interested in what he wanted to tell me—I asked him what for. He says "About a murder." Naturally I was interested in it. I said "what murder,"——

Mr. Ryan: My objection goes to all of Officer Wiles' testimony from this time forth.

The Court: Let the record so show.

Mr. Collier: Go ahead.

The Witness: A. Anyway, he asked me about a homicide officer, and then I was interested. I asked him as the gentleman has said. He said "About a murder." I said "What murder?" He said about a 15-year-old girl, about a week before that; that the missing report would be downstairs. And I didn't know a thing about that. I said [fol. 56] "Who did it?" He said "Me." And I asked him where the body was. He said "Out towards the Oregon ship yard in a slough." And it was during the time—I was then entering the third floor with him to get Sergeant Mitola. I had taken him back upstairs, and then Mitola came later on, and then the conversation took place then on the way out to the place where I went with him in company with Eck. We talked to him in the car, in the back of the car going out there.

The Court: Mr. Strugatz, can you hear all of the testimony?

Juror Strugatz: Not all, your Honor.

The Court: Will you keep your voice up, sir? And if you jurors who are farthest away can't hear at any time, now or at any time during the trial, please let me know.

Mr. Collier: Read the last answer.

(The last answer was read.)

Mr. Collier: Q. Did he tell you that there had been a missing report?

A. He told me the missing report would be on file downstairs if I would look.

Q. Did you know about any missing report yourself?

A. No, I didn't; no, sir.

Q. Did you know that any homicide such as he described had taken place?

A. No, sir, I didn't.

Q. What did he tell you on the way out there?

A. Oh, he described—he told me how he met the girl, he told me, on Willamette Boulevard, and that the girl was coming from the rear of his car and he saw her coming toward him, and that as she approached the car, that—I can't recall the exact conversation—but she got in the car with him. It was about 4:30 or 4:45 in the morning [fol. 57] of the day that he met the girl and that she

got in of her own accord and they drove off down to where, I presume, where he took us, on arriving where we did stop that morning——

Mr. Ryan: I object to that. He has no right to presume anything.

The Court: I will strike from the record the statement of the witness that he presumed something or other, and the jury will disregard it.

Mr. Collier: Go ahead.

The Witness: A. (Continuing) He described to me that the—on leaving the car—that the girl got out of the car and they walked towards the river, and then, it was then I asked him if she went of her own free will and accord. He said no. He said that he had a knife on her during the time of walking from where he left the car to where he was walking down into the slough, bushes and that sort of thing, and he came upon a man who was down in the bushes, in the shrubbery down there, and he said that he continued farther on.

Q. Did he tell you why he had killed her?

A. He told me that he killed the girl due to the fact that she—I asked him if he raped the girl. He said no; that he found out that she was a good girl and he knew that she would go to the cops anyway and they would come and pick him up, so he thought he would kill her.

Q. Did he tell you why that he—strike that—Did you ask him why he told about it?

A. He said he had it on his mind. He wanted to get it off his mind.

[fol. 58] Q. As I understand it from your testimony that you accompanied the defendant Leland and the officers down to this place where the body was found on the—near the river?

A. Yes, sir.

Q. What direction was that from the St. Johns bridge?

A. That would be a northwesterly direction.

Q. How did he take you down there? Just give the details of how you went down there after you got into St. Johns.

A. We parked the police car in which we rode with the

boy and Sergeant Mitola driving, we went out to North Edison and St. Johns Avenue and we parked the police car there, and it was then that Morris directed us to where to stop and park the car so we could go in and go down to where he was going to show us something. And we——

Q. Who led the way?

A. The boy, Morris Leland. And we got out of the car and he was quite particular as to the exact road we would take to go down there. And we told him—he led the way; he had a searchlight in his hand, and it was Patton, Eck, Mitola and myself and Thompson. And so Morris led the way down there because we didn't know exactly where to go; it was approximately 1,000 feet or more. We circled around different directions and up and down, over a bank, and walked the railroad track, and farther on down to where he seemed to us to stand and look to make sure where he wanted to go. He described it to us by saying it was "No, not here; look over there." So we did. We looked where he told us to. We didn't know. We came to one spot and he said "No, not there; look in there," and kind of turned his head away from us, and we naturally [fol. 59] went where he told us to look, and so in doing so we uncovered and saw the location, found the body where he had pointed out to us where he said he had buried her.

Q. While you were there, you may state whether or not pictures were taken.

A. Yes, sir, there were.

Q. Who were they taken by?

A. Thompson of our finger print identification bureau. He took the photographs.

Q. Was it light or dark?

A. Dark.

Q. And what did you have with you by way of flash lights or a light?

A. I had a flashlight and Mitola had a flashlight and the boy had a searchlight that we later used after we got there. We just had flashlights and heavy searchlights.

Mr. Collier: Will you mark this for identification?

(Certain documents were marked by the Clerk State's Exhibits 1, 2, 3 and 4 for Identification.)

The Court: The District Attorney will, of course, see to it that the jurors don't see any of these pictures until such time as they are received in evidence.

Mr. Collier: Yes; that is what I am attempting to do, and if it appears that they are, I wish you would call it to my attention,——

Q. Having been directed to the spot, will you describe to the jury as best you can the appearance of this place surrounding the place where you found the body?

A. The trees were quite high and there was leaves and heavy trees mostly. It was underbrush and heavy brushed [fol. 60] leaves and trimmings and that sort of thing. The one to the right of us would be—I don't know the exact directions out there—was an open space and to the left of where we were at was quite heavily brushed, and this particular location that we went in it sort of had a sort of opening, a sort of extra wide space and we went back into there and it was into that area we were shown.

Q. The exact spot surrounding the body, what was the condition?

A. Heavily brushed and treed; shrubs.

Q. Could you see into it from the outside?

A. No, sir.

Q. Did you go in there?

A. Yes, sir.

Q. What did you find?

A. We went directly to look in there, with that, and we sort of maneuvered around and uncovered what we had reason to believe was shrubbery, driftwood, and we unpiled that and found the body. We found the body where we were shown.

Q. When you got in there, what did you find?

A. Driftwood and tree limbs covered over, and what we saw was sort of a special driftwood put together. We moved the driftwood and took the tree limbs off of the driftwood and we uncovered the body.

Q. What was under the driftwood?

A. A heavy blanket; and under the blanket we found the body of a girl.

Q. How was she lying?

A. With her back—face upwards and her arms sort of [fol. 61] stretched out, one arm lying to the side, like, just lying flat on her back with her arms stretched somewhat; her lunch box to her side; her thermos bottle to her side. She had Levi pants on, belt and buckle, and neatly buckled up, and her pants and clothing were in order, and her waist was buttoned except for an opening in her stomach which appeared, and I did see, what appeared to be blood stains on her stomach. It was merely open like a bunch of clothes pulled back. Other than that she was neatly dressed.

Mr. Collier: Will you mark all these articles that are in this box, please? Can I walk around in back of him?

The Court: No, that isn't necessary.

Mr. Collier: Q. I hand you State's Exhibit 1 for Identification and ask you to look at that and state to the jury whether or not that truly resembles and pictures the scene as you then saw it?

A. Yes, sir, it does.

Q. I hand you State's Exhibit 2 for Identification and ask you to look at that and state whether or not that picture truly represents the scene as it then was?

A. Yes, sir, it does.

Q. And I see—strike that—state whether or not you are in that picture?

A. I am, yes, sir.

Q. I hand you again State's Exhibit 1 for Identification and ask you whether or not you are in that picture?

A. I am, yes, sir.

Q. And the person holding the flashlight, the large flashlight, who is that?

[fol. 62] A. That is Sergeant Mitola. This (indicating) is Sergeant Wiles.

Q. And that (indicating) is yourself?

A. Yes.

Q. And in State's Exhibit 2 for Identification, I will ask you whether you are in that picture?

A. Yes, sir, I am.

Q. And I will ask you who the person is holding the heavy flashlight?

Mr. Ryan: If the court please, these pictures speak for themselves. Unless that has some—if they are attempting to describe what is in the picture, I don't think is competent at this time.

Mr. Collier: I'll show the court the picture.

The Court: Merely identifying the individual in the picture is not objectionable. You may answer.

Mr. Collier: Q. Who is the party holding the heavy flashlight?

A. That is me, Wiles.

Q. And I hand you—strike that—After the driftwood and blanket were removed, where did you go?

A. I left.

Q. And you were not there upon the taking of any further pictures?

A. No, sir, I was not.

Mr. Collier: I wanted counsel and the court to note that I am tearing a police tag off of this, which would not be admissible in evidence.

Mr. Ryan: That is all right.

[fol. 63] (An article was marked by the Clerk State's Exhibit 5 for Identification.)

Mr. Collier: Q. Now, officer, I hand you State's Exhibit 5 for Identification and ask you to look——

Mr. Ryan: If the court please, before that is done, may I see that blanket?

Mr. Collier: Yes; take a look (handing article to counsel).

Q. I ask you to look at State's Exhibit 5 for Identification, which I hold in my hand, and ask you what that is?

A. That appears to be a mat, or rug mat, used by a trucking concern, a covering mat or pad or something of that sort.

Q. No; what is this in regard to this case?

A. That appears to be the type of covering I saw over the girl.

Q. Does that look like the blanket?

A. It appears to be the same type and kind, yes, sir.

(An article was marked by the Clerk State's Exhibit 6 for Identification.)

Mr. Ryan: If the court please, before there is any hearing on that I would like to have a *have a* hearing in chambers.

(The following proceedings were had out of the presence and hearing of the jury.)

COLLOQUY

Mr. Ryan: With reference to No. 1, a picture: As the court realizes, describing the situation as the officers arrived, there is driftwood piled over a blanket. Whether or not that is the door of the grave or not is not of importance. Regardless of whether this picture were gruesome or not, it would be inadmissible as purely cumulative. It has no purpose to prove any fact at issue in this case. [fol. 64] It doesn't serve any purpose that I can see at all. It is irrelevant to the issues and it has—the only reason that I can see that it is introduced here is to try to picture a scene of gruesomeness and horror, and this is just a part of that whole attempt of the District Attorney——

The Court: What do you claim for No. 1?

Mr. Collier: Well, it helps the jury to better understand the evidence of the witnesses, and, like the Chinese say, a picture is worth a thousand words. That is exactly the way it looked and it is far more descriptive than a person can make it in his own words. It assists the jury in determining what the thing looked like. It goes to his consciousness of guilt.

(The objection was argued to the court.)

The Court: I have had quite a bit of experience considering the circumstances under which photographs would be admissible in evidence. Exhibit No. 1 is not objectionable as depicting a gruesome scene. It is admissible, in my opinion, to support the State's theory of the case as being some evidence substantiating consciousness of guilt and an effort to conceal and, possibly, intent and premeditation. I, when offered, would overrule any objection to Exhibit 1. Now, Exhibit 2, Mr. Ryan.

Mr. Ryan: Exhibit 2 does not add anything to Exhibit 1 except it is one of the most gruesome pictures you can

imagine of a young girl who had been—had decomposed for a week or ten days.

The Court: What do you claim for 2?

Mr. Collier: That, your Honor—there is no reason why the jury should not know the facts exactly as they were. [fol. 65] The State didn't make those facts. The defendant made that girl to be as she was in that picture, and to help assist the jury in determining exactly as to how she was lying and under what conditions she was.

The Court: Exhibit 2 would not, in my opinion, be admissible for the same grounds as Exhibit 1——

Mr. Collier: Would not?

The Court: Would not. Exhibit 2 is a most gruesome picture. It would serve no purpose other than to inflame the passions and sympathy of the jury. Exhibit 1 answers all purposes that can legitimately be served by these two photographs. When offered, I would sustain the objection to Exhibit 2.

Mr. Collier: I think Mr. Carskadon has a little law there.

The Court: With reference to this gruesome picture?

Mr. Carskadon: I wish your Honor would reserve your finding just for a moment. I am looking at State v. Henderson——

The Court: All of these cases go on the same legal basis that if a gruesome picture serves a legitimate purpose in the case, it is admissible even though it is very damaging to the case. Now, that is the law. If it serves no legitimate purpose, either for the purpose of showing an intent, or purpose, or determination, but merely is offered on the theory "Well, the defendant did it and therefore any old picture that is taken, however gruesome, is admissible," why, it is clearly wrong and the pictures are not received, and you have no authority to the contrary.

Mr. Carskadon: It may be used to prove corpus delicti and the killing was done by someone else.

The Court: Neither of which is in this case.

[fol. 66] Mr. Carskadon: Oh, yes; they have entered a not guilty plea which puts in evidence——

The Court: I would sustain the objection.

Mr. Collier: I call your attention also to the fact that they—it shows planned malice, there is no question about it.

The Court: You would have no difficulty in getting sufficient evidence to take it to the jury upon the ground of malice.

Mr. Collier: But we aren't bound——

The Court: I am not receiving this merely for the purpose of inflaming the jury. Now, to some extent I am governed by my own reaction to this picture, which actually, to me, serves no purpose and makes me exceedingly nauseated and inflamed against the individual who may be responsible for it.

Mr. Collier: I call your Honor's attention to State v. Young, 52 Or., which provides that the fact that the defendant admits certain things to be true does not in any way interfere with or stop the State in showing that evidence——

The Court: I agree with that.

Mr. Collier: And the Greco case went into it in detail——

The Court: There is no question about it. But when evidence is available or proof of a corpus delicti other than by production of photographs that are so exceedingly gruesome, then, as I say, that evidence would be excluded, and has been. What is next?

Mr. Collier: The only reason I mention that now is in anticipation of further objections.

The Court: Sure.

Mr. Collier: Now, we are about to offer in evidence the Levis the girl was wearing——

[fol. 67] The Court: I am going to let the jury go.

(The following proceedings were had in the presence and hearing of the jury.)

The Court: You will be excused until 2:00 o'clock, Ladies and Gentlemen. Recess to 2:00 o'clock. Will you be seated, please, until the jurors have entered the jury room?

(Thereupon the following proceedings were had out of the presence and hearing of the jury.)

The Court: You are addressing yourself to what is marked as an exhibit, the Levis that were worn by the girl at the time she was killed. Is that right, Mr. District Attorney?

Mr. Collier: Yes.

The Court: Let's proceed this way, gentlemen: Assuming that the State has offered, or will offer, these Levis, what is the objection?

Mr. Ryan: I object to them, first, that they are the type of exhibit which would tend to arouse a lot of sympathy for the young girl in a case of this kind. They have no probative value at all. It has nothing to do with the crime, the fact that she had Levis on, and there is nothing in the Levis themselves that will shed any light on this case either for the State or for the defendant. The only thing, possibly, that these Levis can do is to build a picture that will arouse a lot of emotions on the part of the jury, and hasn't anything to do—there is no contention that she was stabbed through this particular clothing, or anything of that sort. These were on her, and that is all. I don't think it proves anything at all except, perhaps, sympathy.

The Court: Your objection is in the record.

[fol. 68] Mr. Ryan: Yes, it is. I think I covered it quite fully. The only thing I might add to it, there is a little bit of blood on those Levis, and to that extent it would be gruesome.

The Court: What purpose do they serve?

Mr. Collier: Clothing is always admissible to show the condition she was found in.

The Court: What purpose do they serve? With or without clothing, she was found. What purpose does clothing serve?

Mr. Collier: You are suggesting it doesn't make any difference whether she had clothes on or not?

The Court: What?

Mr. Collier: You are suggesting it doesn't make any difference whether she had clothes on or not?

The Court: Well, presumably she had clothes on. At any rate, you are going to offer this for the purpose of showing what she was wearing at the time she was found?

Mr. Collier: It corroborates the statement of the officers that that is what they found. In other words, I don't think it is for any court to say "You shall be bound by certain evidence which I select." I grant you the evidence is discretionary with the court,—don't get me wrong,—but I mean as a practical matter I don't think it is for any court

to say "Now, Mr. District Attorney, you are going to be permitted to show only certain evidence which in my judgment I think would show certain elements of the case." It corroborates the statement of the officers,—"Here is what [fol. 69] we found when we got there; there is a picture of it."

The Court: He testified she was wearing the blue Levis.

Mr. Collier: That is right. And it definitely corroborates that.

The Court: What do you think?

Mr. Ryan: I think, under that contention, that anything that added—I don't believe—I think the court, when evidence is merely corroborative and cumulative, has a right to exclude it, particularly when using it as a vehicle of remote corroboration that this will give. They are bringing before the jury something calculated to arouse the sympathy of any human being.

Mr. Collier: There is nothing prejudicial about a little blood on the pants.

Mr. Ryan: It is certainly prejudicial to have a young lady's Levis there. It shows her poverty and a lot of background that is going to get into the case——

Mr. Collier: Oh——

Mr. Ryan: Let me finish: It is going to show the background of this whole thing. They are trying to picture this girl as a victim of this boy, which is true, that she is, but the purpose of this trial is not to arouse the sympathy or passion of this jury. The purpose of this trial is to determine facts. There isn't one bit of evidence to be proved by these Levis in this case.

The Court: I think that the exhibit is admissible. It would corroborate the testimony of the officers as to what the girl was wearing when the body was found. In and of itself, the trousers are not gruesome in the ordinary sense. If offered, I would overrule the objection.

Mr. Collier: Now, the State will offer a brassiere in evi- [fol. 70] dence which the court will note has—this is a white broadcloth brassiere. It is not marked yet as to number. And on the top of the brassiere is what appears to be blood stains, and about the middle of it is very definitely a hole which we will show was made by the knife,

and it definitely tends—it shows the malice, and the corroboration of the statements of the officer and will assist the doctor later on when the doctor testifies as to his findings, and the evidence will show the doctor undressed this girl at the morgue.

The Court: What would be the objection?

Mr. Ryan: The only objection is the gruesomeness of it. I can see where there is a purpose of that being introduced and I will object to it as being gruesome and as contradistinguished from the Levis.

The Court: It would, if offered, be received in evidence.

Mr. Ryan: We do object to it as to its gruesomeness.

The Court: My basis for my ruling would be this: That in view of the fact that the State's contention is, among other things, that the knife was used, and this apparently shows knife cuts and the location in the body, and would have some tendency to support the State's theory.

Mr. Collier: Now, we have here a plaid jacket, which is not yet marked as to number. It is a brilliant red, blue and green jacket and the court will note a similar hole in the jacket made by the knife.

The Court: Any objection to the jacket?

Mr. Ryan: No.

The Court: Very well.

[fol. 71] Mr. Ryan: I will make this one objection to all this clothing: It is introduced for the purpose that counsel stated here and if he uses it in an attempt, in his argument, to arouse the sympathy of the jury by reference to it in such manner, I will reserve the right to object at that time.

The Court: What is the next?

Mr. Collier: The next, your Honor, is, I would say a blouse or shirt, which is not marked yet by number for identification, and it is generally pink in color, having white squares within white squares; the upper portion of the shirt being the color—has marks appearing to be blood and the court will note a hole in the shirt right here (indicating).

The Court: Any objection to that?

Mr. Ryan: I don't have any objection to it except as I directed by objection to the brassiere. At this time I

renew the objection I made to the brassiere, regarding the gruesomeness of it, and I haven't examined this jacket that you introduced before. If there is blood on that I will object to it on the same basis of being gruesome. However, if you have one item of clothing to fix the place where the knife went through the body, I see no purpose by having two items of clothing to fix that same place on the body. Therefore I object to it as being cumulative and put in here only for the purpose of inciting the passion of the jury because of its gruesome nature. You follow me on that objection?

The Court: Oh, yes. However, the fact that the articles may be gruesome, if otherwise admissible, naturally would not disqualify them as being evidence, and the fact that [fol. 72] there are several articles that presumably show knife penetrations would not mean that only one of those articles should be admitted. It is contended that there were several thrusts of a knife and in my opinion this article would be admissible in evidence, if offered, and that would be my ruling, as I am presently informed. What else?

Mr. Collier: That is all I have.

Mr. Pelay: You are not going to offer that belt?

Mr. Collier: As far as I know now, no. It might be that in talking to the officers, I may.

The Court: All right. Two o'clock, gentlemen.

Mr. Pelay: There were four pictures. I wonder if we couldn't dispose of the other two?

Mr. Collier: No, we can't.

The Court: Two o'clock.

(A recess was taken until 2:00 o'clock P. M. of this date, November 2, 1949, at which time proceedings were resumed, as follows.)

[fol. 73] November 2, 1949.

(The following proceedings were had in the presence and hearing of the jury.)

CHESTER WILES, a witness on behalf of the State of Oregon, resumed the witness stand and, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Collier (Continued):

Q. I hold in my hand State's Exhibit 6 for Identification and ask you if you have seen this before?

A. I have seen a pair similar to that.

Q. What does it look like?

A. A pair of Levi pants that the girl had on.

Q. At where?

A. Where we found her body in the shrubs.

(An article was marked by the Clerk State's Exhibit 7 for Identification.)

Q. I hold in my hand State's Exhibit 7 for Identification and ask you to state whether you have seen this before?

A. I have seen a jacket similar to that on a girl that we found buried in the shrubs.

Q. And that girl you are referring to was found in the shrubs August 11th at the time that Morris Leland took you to the place where the body was?

A. Yes, sir.

Q. And that looks like the jacket that was on the deceased?

A. It appears to be the same type of jacket, yes, sir.

(An article was marked by the Clerk State's Exhibit 8 for Identification.)

Q. I hold in my hand State's Exhibit 8 for Identification and ask you if you have seen that before?

A. That appears to be the same type of jacket that we [fol. 74] found on a girl buried in the shrubs in the St. Johns area, yes.

Q. And that is the same body that Morris Leland directed you to?

A. Yes, sir.

Q. Now, Mr. Wiles, you didn't—or did you—see her clothing below her belt other than what I have shown you?

A. No, sir, I didn't.

Q. And what sort of shoes was she wearing?

A. She had a pair of white sandal shoes on, white purse, a sort of a brownish lower white sandals, I would call them.

Q. Did she have any socks on?

A. Bobby socks, a short pair.

Mr. Collier: I believe that is all. You may cross-examine.

Cross-examination.

By Mr. Ryan:

Mr. Ryan: You are not offering them at this time?

Mr. Collier: No, I am not.

Mr. Ryan: Q. Mr. Wiles, did you ride out to the scene of this crime with the defendant?

A. I rode in the back seat of a car, yes, sir.

Q. You went out there with Sergeant Mitola and the defendant?

A. Yes.

Q. The three of you were together?

A. Yes.

Q. And you rode out into St. Johns some place?

A. I rode out into the St. Johns area, North St. Johns and Edison, and we left the car, all of us.

Q. Did you walk quite a distance?

A. Yes, we did.

Q. How far?

[fol. 75] A. I estimated the distance to be about, I would venture to say, 1,000 feet from where we got out of the car to where we stopped.

Q. Was it on a path?

A. No,—it was an irregular path; it was a zigzag matter.

Q. It wasn't a simple matter to get there in a car?

A. In a car; it was dark.

Q. After you left the car——

A. It was an irregular path.

Q. How far from Willamette Boulevard was this place?

A. Oh, several blocks from Willamette Boulevard.

Q. Approximately how many?

A. Oh, I would be guessing when I would say six or eight blocks, maybe nine blocks, farther north.

Q. Isn't it quite a bit farther than that?

A. Well, it could be.

Q. Willamette Boulevard—I may be mistaken—Willamette Boulevard, as I recall it, ends at the police precinct there in St. Johns.

A. Yes; I think it is Philadelphia Avenue. I am not positive. Quite a ways.

Q. You say seven or eight blocks or maybe farther?

A. I may be mistaken.

Q. Maybe 15 or 16?

A. I would say—I am not positive—approximately eight or ten or more blocks.

Q. How far from Fessenden Street was it?

A. Oh, it was quite a long ways from where I was from—Fessenden is a sort of a circular area, Fessenden Street. Quite a ways.

[fol. 76] Q. In any event it is several blocks?

A. Yes, sir.

Q. It isn't a question of three or four or five blocks?

A. No. I would say several blocks.

Q. Maybe even a mile?

A. I wouldn't be positive as to being a mile.

Q. After you arrived at this place you went out and across the country down to this place where you say you found the body?

A. Yes.

Q. How long did it take you from the time you left the car until you got to the body?

A. We walked rather slow. I would say 15 minutes, 10 or 15 minutes or so, in walking slowly as we were.

Q. Well, it was a matter of some distance anyway?

A. Yes, sir, it was.

Q. And was it the type of place where a person would have, at times, to go and use his hands to get along?

A. In going down an embankment—we went up an embankment one place where the ground had been dug in and made a step. Whether children have played there or not I don't know, but it was a home made step that goes down on to the railroad track.

Q. Then you walked along the railroad track?
A. Yes.
Q. About how far?
A. I can't be positive as to the exact distance on the railroad track itself; enough to get on to the other side.
Q. Were there any houses down in that area?
A. No, sir.
[fol. 77] Q. What type of vegetation is down there?
A. Well, it is sandy and—oh, I just don't know—and bushes and tree limbs.
Q. It isn't a forest area?
A. No; high bushes, shrubs, and sand.
Q. Some of it cleared?
A. Well, the open space where we walked in the sand, that was quite clear; still, it had small brush in it, growing out of the sand.
Q. You walked along the railroad track some distance. Then did you leave the railroad tracks?
A. Yes. We turned to the left. We went quite a ways.
Q. You said it was 1,000 feet.
A. From where we left the car, and in an irregular manner of walking. We circled back and forth and turned to the left from the railroad track and went back in towards the river, slough.
Q. How far is the track from the river?
A. It seemed like it was quite a ways.
Q. Do you know for sure?
A. I am not positive.
Q. You wouldn't say?
A. No.
Q. But it is within—the river is in sight of the track?
A. No; the river is on the other side of the track.
Q. The river is on the other side of the track?
A. Yes, sir.
Q. You say you circled around quite a bit?
A. He sort of picked his way, endeavoring to go the [fol. 78] easiest way, it appeared to me. It wasn't a direct route. It was sort of down and then sort of southeast and back to the north again.
Q. Did he hesitate along the way?
A. Well, he did; he wasn't positive exactly of the spot

that he wanted to go. He picked the way out, the best way for us to go.

Q. How long did it take you after you left the track to get to where you were going?

A. Oh, I would say several minutes.

Q. He didn't go direct, then, did he?

A. No.

Q. You looked around?

A. He did. We didn't know what we were looking for.

Q. You followed him, though?

A. Yes, sir, we followed him.

Q. And he didn't seem to know exactly where he was going?

A. Well, he had an idea where he wanted to go. He wasn't positive of the exact spot until we arrived to where he said "Look in there."

Q. This place where he said "Look in there," how far was that from the railroad track?

A. Well, that seemed like it was quite a ways.

Q. That means nothing.

A. I would really be guessing.

Q. You didn't pay any attention?

A. No, sir, I didn't.

Q. You wouldn't know if it was 20 feet or 100 feet?

A. It was more than 20 feet. I would say close to 100 feet, if not more. I am not positive.

Q. You said you came about 1,000 feet.

A. No. It was approximately—from where we got out of the car, from the time we got to where the location was [fol. 79] where we stopped, the route we took.

Q. What was this location like?

A. Well, it was high shrubs and trees and bushes and some tall trees and—not too many tall trees—and sort of undergrowth or slough.

Q. Was it very thick?

A. Some places it was thick.

Q. Could you see through it in the day time, do you think?

A. In some spots perhaps you could, yes.

Q. How big an area did it cover?

A. What?

Q. How large an area? Was it as large as this room?

A. Oh, it is all along the river.

Q. This isn't just an isolated spot along the river?

A. No, it is thick; it seemed to be that way along the river.

Q. The impression I got from your testimony on direct examination, that this place you came to was a clump of bushes and trees and then there was a clear space on both sides of it.

A. No, no; it was that way, similar to that, all the way along the water front, the slough—bushes and tree limbs and bushes and just all sorts of shrubs.

Q. You think you could give us on the blackboard a picture of where this location was?

A. Would you care if I told you that the next day I went out by there and I couldn't find the place myself.

Q. And it was dark, I presume?

A. Yes, sir, it was.

Q. You looked at several places, didn't you?

[fol. 80] A. He did. He hesitated at, I'll say, about two or three spots before he was quite sure by telling us to "Look in there."

Q. Now, in your direct examination you made the statement that Leland told you a story when he talked to you.

A. Yes, sir.

Q. And among other things he said that they met a man?

A. Yes, sir.

Q. Was there anything said to the man at that time?

A. No, sir, there was nothing said other than he had seen a man there and that he was going to stop there but he went on farther down.

Q. He passed by a man?

A. He passed by the man, yes, yes, sir.

Q. At that time did he have a knife on the girl, from his story?

A. I wouldn't say positive whether he had the knife at that time.

Q. That is what he told you?

A. Yes.

Q. Did he say he had that?

A. He said he did, yes.

Q. All the time?

A. I presume, yes.

Q. You are sure?

A. I am sure what he said.

Q. There are conflicting stories here,——

A. I realize that.

Q. And we are going on the admissions he made to you. Was he excited at the time he told this story?

A. No, he wasn't excited at the time he told this story.

[fol. 81] Q. Very calm?

A. Very calm and cool, yes, he was. I had asked him if she went of her own free will and accord and he said no, he held the knife on her, walking with her.

Q. That is all he said?

A. Yes.

Q. You don't know whether he had the knife on her all the way or——

A. I don't know.

Q. —part of the way or whether he held the knife on her at all?

A. All I know is what he told me.

Q. And he walked from where he met her in St. Johns, down there?

A. No; she got in the car. He put her in a car on Willamette Boulevard, he told me.

Q. What happened to that car, do you know?

A. Well, I would just be forming my own opinion.

Q. I don't want that.

A. I realize that. All I can say is where he pointed out the location of where the car was.

Q. Did he do that when he was out there?

A. Yes, sir.

Q. Was there a car there that night?

A. No.

Q. Would you have checked?

A. No; it was too far away. He pointed in the direction by saying he stopped "over there." Where he meant, I don't know.

Q. Did he talk to you about a car that night?

A. He had driven?

Q. Was the car supposed to be there at that time?

[fol. 82] A. No. That was the week before that that car had been recovered, I understood. That would be just hearsay.

Q. When the defendant talked to you in the jail and told you about this, did you warn him that what he told you might be used against him?

A. No.

Q. Did you tell him he had a right to an attorney?

A. No, I didn't.

Q. Did you in any way discourage his statement to you?

A. No, sir, I didn't. I just listened as to what he had to tell me of his own free will and accord.

Q. And he looked unexcited and undisturbed by this thing?

A. He wasn't excited, he wasn't disturbed, or anything.

Q. He wasn't disturbed at all?

A. No.

Q. Apparently just as if it never had happened?

A. Yes. He felt as though he had something to tell some one. I asked him if I was the first one he talked to and he said yes. I asked him "Have you told anybody else about this?" He says "No." And I just listened to him.

Q. Was he certain as to when this happened?

A. He thought about a week before that.

Q. He wasn't positive?

A. He said he thought about a week.

Q. About a week. He didn't say a week, though?

A. Well, all I know is what he said. He said about a week before.

Q. Well, now, what day was that?

A. It was the 11th. That would be a week before that.

[fol. 83] Mr. Ryan: That is all.

Mr. Collier: That is all.

Mr. Ryan: One more question.

Mr. Collier: Go ahead.

Mr. Ryan: Q. This place where the body was found, was there any hole in the ground or anything like that?

A. Well, it apepared to me that there was a sort of an impression into the ground where it had been somewhat dug out.

Q. Was there any dirt around there?

A. Yes.

Q. But there was—as I understand it there was this pile of driftwood and the blanket showed above the ground?

A. Yes, sir, it did.

Q. And it was apparent to anybody that came in there; he could see it?

A. No, no; he couldn't have seen it. It appeared to me that the body was below the driftwood, and the driftwood was somewhat even with the ground, covered over.

Q. This picture that you identified accurately shows the way it was?

A. Yes, sir, it does.

Mr. Ryan: That is all.

Witness excused.

[fol. 84] Dan J. Mitola, a witness on behalf of the State of Oregon, resumed the stand and, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Collier (Continued):

Mr. Collier: Mr. Reporter, would you refer back to Officer Mitola's testimony so that I may know where we stopped?

The Reporter: (Reading) —Q. Would you go ahead and outline to the jury what he told you?

A. He stated that he wished to tell us about a crime which he had committed the week prior, and I asked him what it was and he said——

Mr. Collier: Q. Where did that take place?

A. In the jail at the police station.

Q. Just go ahead, officer, and tell us what happened.

A. At this time I interviewed him briefly and asked him what he had done. He said "I killed a girl last week and

the body is out near the Oregon shipyards in the St. Johns area." And I said "Do you know who the girl was?" He says "Well, there was a picture of her in the paper the other day. She was a girl who was to go bean picking and her parents made a missing persons report and the picture was run in the paper." And I asked him if he could direct us to the locality and he said "Yes, but when we get out there I don't want to look at the body."

So after getting this information we went to the third floor of the police station to the detective office where I obtained a large flashlight and contacted the Bureau of Identification, Officer Thompson, as we wanted to have some photographs taken at the scene. After this was done we went down to the street and got into the police [fol. 85] cars and in company with Sergeant Wiles, Officer Thompson, Officer Patton and Detective Eck and Mr. Leland and myself, we headed out towards St. Johns. Leland was in the back seat, and Sergeant Wiles, and I was in the front seat with my partner. I said "Which way do we go?" He says "Let's go to the St. Johns bridge." So we proceeded in that direction and when we got to the St. Johns bridge he said "Go underneath the bridge and follow this street." So that street is Edison, and we went as far as we could go on Edison north of the bridge, and then when we got to the end of the street he said "We'll have to turn to the left here and go down this dirt road." So we turned to the left and we came to this place where we could drive no farther and so we had to get out and walk——

Q. Let me interrupt you now: Do you recall offhand the name of the street intersecting Edison at that point?

A. I believe it is St. Johns Avenue.

Q. St. Johns Avenue. Go ahead.

Mr. Ryan: Pardon me, your Honor. I want, so the record will be clear, to make an objection to all this line of testimony, and all the testimony of Mr. Wiles, on the ground that we stated in chambers.

The Court: Let the record so show.

Mr. Collier: Go head.

The Witness: A. (Continuing) We all got out of the cars and started down this path, and I gave Mr. Leland

this large flashlight and—so that he could see where he was going. We went across a railroad track and then walked for quite some time, I would say approximately, oh, between 15 and 20 minutes, and walked towards the [fol. 86] river and then headed north along the river bank. And the area there is such that there is trees, small trees and blackberry bushes, weeds and what-not. And he repeated while we were walking—the conversation wasn't, amounted to a great deal—but he repeated two or three different times that when we arrived at the scene he didn't want to look at the body.

So we finally arrived at an area there where there was several trees growing, and quite a clump of trees, and we walked towards the right, then, and into this clump of trees, and then he pointed over in the direction, he said "It's in there." So we had him wait about 15 or 20 feet away from this place where he pointed out, and as we flashed our lights in there under this clump of trees we could see this driftwood piled. So this driftwood consisted of, oh, limbs probably from trees about that big around (illustrating), about four inches around, some smaller, and some two or three feet long and some eight or ten feet long, quite dry and very light. And after finding this scene I walked to the right of this clump—this pile of logs—and squatted down to see if I could observe anything under the logs. I did see a hand protruding in between these logs and there was a definite odor present. And before removing any of the logs I had Officer Thompson take a photograph of that particular scene.

After this was done, the logs were removed and there was a brown blanket covering the—you could then see an arm and a hand protruding from under the blanket. So we had another photograph taken of this and then had the blanket removed, and after this was done we found the body of a girl which I described as being about 15 years of age, about five feet tall, brown hair, in the neighborhood [fol. 87] of 100 pounds, and the clothing which was worn was a red plaid jacket, a pink blouse with white designs in it, blue Levis, white bobby sox; and brown-and-white saddle shoes. The blouse and jacket was pulled up from the waist about six inches and there was dry blood on the body there

and the face of the girl had a large scar right on the left side of the forehead just above the eye, that was about four inches long, quite wide, and the bone was noticeable. There was a scar just over this eye on the right side. One eye had been exposed to the elements and closed. The other didn't seem to be exposed to the elements as much as the right eye. And the hair was matted with blood and dirt and the top of the head had a cut from which the scalp had been pulled away, exposing the skull. This would be about the size of a dollar.

After examining this particular scene we had additional photographs taken of this, and after this was done we all proceeded back to the St. Johns precinct and from there I contacted the coroner and contacted Mr. Collier. And due to the proximity of the river at that particular area we thought it advisable to contact the harbor patrol, so that the body could be removed rather than carry her through that brush and trees which we had gone over before. We arrived at that, at the scene, at about 3:00 A. M., and it was dark; the moon was shining somewhat; rather cloudy. And then we returned, arriving at the St. Johns precinct about 3:45 and waited there for the arrival of Mr. Collier and Mr. South and Mr. Sneeden from the coroner's office, then all proceeded back down to the same spot again. Both times Mr. Leland accompanied us to the station and back down to the scene again, and after arriving there the scene was again examined by the District Attorney and [fol. 88] the coroner, after which the coroner ordered the removal of the body.

I forgot to mention, prior to leaving the scene the first time for the St. Johns precinct, officer Thompson removed from the pocket of the deceased a wallet, round wallet, which contained a Portland Traction Company identification card, and this card had the name of Thelma Taylor on it.

While waiting for the District Attorney and the coroner at the St. Johns station I contacted the record division and checked if there was a missing person report on a person of that name, and such a report had been made to the police department by the girl's parents. And I then contacted the Womens Protective Division, who had an

additional report made by their division and under the same name. And the description of the clothing that was given on the report by the mother to the police department tallied very closely with the clothing that the deceased was wearing when we examined the scene.

After the coroner and the District Attorney had examined the body, the coroner ordered the body removed, at which time the officers had arrived by boat on the river and were directed to the scene and the body was placed on a makeshift carrier, using a blanket and two oars, and the body was then removed and taken down to the harbor boat. After this was done we examined the scene further and at approximately where the left shoulder would be I found a set of gold glass frames which a person would have for eye glasses. One of the lenses was broken out of one of the glasses, and on further examination found a piece of a lens almost in the same locality, and a hair clip, aluminum hair clip, also a green lunch pail, rectangu- [fol. 89] lar shape, a thermos bottle, black color with black-and-white stripes, and the two blankets which had covered the body. All these articles were gathered and taken to the police department where they were marked and put away as evidence.

Now, during the time that we walked back and forth, from driving in the car and walking back and forth from the station to the location where the body was found——

Mr. Ryan: If the court please, I have permitted the detective to go on in a narrative form, but I think if he is going to go beyond that I think it should proceed on a question and answer basis.

The Court: Very well.

Mr. Ryan: I think that it is fair for us, that we have an opportunity to interpose objections.

Mr. Collier: Read the last part of that answer.

(The last part of the answer was read.)

Mr. Collier: Q. What happened?

A. We interviewed or carried on a conversation with Mr. Leland.

Q. What was said?

A. I asked him where he had met this girl. He said he had met her on Fessenden Street in St. Johns, and then I asked him on what date and what time. He said it was on Friday, around four, between 4:00 and 4:30 in the morning. I said "How did you happen to meet her?" He said "I just walked up to her and she willingly accompanied me." And I asked him what his intentions were. He said he did have intentions of committing rape——

Mr. Ryan: Oh, I object to that, your Honor. It brings [fol. 90] another element in the case. It isn't likely a person would say "I had intentions to commit rape." If that is the exact words he used, or he was going to have intercourse with her, it is another story. I think under the circumstances it has nothing to do with this particular act.

The Court: If another offense is involved in this one, that fact would not render it inadmissible,——

Q. Did I understand you to say that he stated this to you, that he had intended to commit rape?

A. Yes.

Q. Or are you saying that you gathered that he had?

A. That is what he told me.

The Court: That is what he told you. You may proceed.

The Witness: (A. (Continuing:) He and the girl walked towards the St. Johns bridge and down towards the woolen mills and then north along the river bank and towards the location where we had found the body, and the time spent from the time he had approached her—during the day he said he spent along the river bank with her and walked around back and forth. And I asked him where they stayed that night. Well, he said he had made a bed under that clump of trees, where we found the body, a few days prior, with these blankets that we found there. And we stated, I said "Did you have anything to eat? Did you go any place to eat?" "No," he said; "the girl had her lunch in her lunch pail. She ate that and I didn't have anything to eat." He said that night they slept on the blankets, and he became somewhat worried because he had kept the girl away from home and he said that due to this fact he was afraid she might turn him in to

the police, and since he felt that way he thought then that [fol. 91] he would kill her.

Mr. Ryan: May I interpose a question here?——

Q. When he said this, was that while they were asleep?
A. That is right.
Q. When they were both asleep?
A. Yes. So next morning he was awakened around seven or eight o'clock——

Mr. Collier: Just a minute. Let me interrupt you there. He said "While they were both asleep."
Mr. Ryan: I didn't mean that.
Mr. Collier: I didn't think you did, either,——

Q. Was it while he was awake or asleep?
A. While he was awake. The next morning when he awakened he still had the same thought in mind—and the girl awakened—so he had her accompany him down to the river. And we had asked him what he had used to kill the girl and he said "I used an iron bar about 18 inches long and about a half an inch around." We asked him where he found this. He said "Down by the river." And he had the girl accompany him to the river where he picked this bar up—and there were several around that particular area, he said—and after this was done they both returned to the clump of trees where this bed was situated, and at that time he struck her with the iron bar. And he said that at that time she raised one arm to ward off the blow and the blow struck her across the arm and partially across the face. And then he struck her several more times until she became unconscious and then with a hunting knife which he had he stabbed her about the breast two or three times. Then after this was done he covered her with a blanket and with driftwood and then took the [fol. 92] knife and the bar and walked down to the river and threw those into the river. Then I asked him if he could show us where this particular area was where he threw the bar and the knife. He said yes. Inasmuch as it was dark at the time we thought we would let that go until the day shift came on duty and they could go down and look for it during the day. After this he left the scene and the next few days he spent sleeping in cars and

in the woods in that area until the time that he was arrested and brought to the police station.

Mr. Collier: Where is this lunch pail?

Mr. Ryan: If you want to go into that I want to go into chambers——

Mr. Collier: I don't mind it being heard right here.

Mr. Ryan: I do.

The Court: There is nothing before me.

Mr. Collier: Right at the moment I ask the Clerk to mark that for identification (handing an article to the Clerk).

(The article referred to was marked by the Clerk State's Exhibit 9 for Identification.)

Mr. Collier: In the presence of counsel and court and jury I want to mention that I am now pulling off a police tag, which would not be admissible in evidence here.

The Court: Very well.

(An article was marked by the Clerk State's Exhibit 10 for Identification.)

Mr. Collier: Q. Now, Officer Mitola, I hand you State's Exhibit 9 for Identification and ask you have you seen that before?

A. Yes.

[fol. 93] Q. Where?

Mr. Ryan: If the court please, at this time I object to the offer of this in evidence,——

Mr. Collier: I haven't offered it yet.

Mr. Ryan: Just a minute, let me finish my objection: —in the presence of the jury as part of an attempt of the District Attorney to inflame the passion of the jury, and I asked at the time it was brought out here in chambers, and counsel insisted on doing it here, and on that ground I ask that we have a mistrial.

The Court: I will deny the motion.

Mr. Collier: I never thought there would be——

The Court: I will deny the motion. You may proceed.

Mr. Collier: Q. Where did you see that article before?

A. This was found next to the body of the deceased.

Q. And I hand you State's Exhibit 10—wait a minute: I am also in the presence of court and counsel and jury tearing off a police tag.

The Court: Very well.

Mr. Collier: Q. I hand you State's Exhibit 10 for Identification and ask you if you have seen that before?

A. Yes.

Q. And where did you see that?

A. That was next to the body.

Q. Now, I hold here State's Exhibit 5 for Identification and ask you if you have seen that before?

A. Yes.

Q. Where did you see that before?

A. That was covering the body of the deceased.

[fol. 94] Q. And handing you—I hold here State's Exhibit 7 for Identification and ask you have you seen that before?

A. Yes, sir.

Q. Where was that?

A. The girl was wearing that jacket.

Q. The deceased in the case?

A. The deceased, yes.

Q. And I hold here State's Exhibit 8 for Identification and ask you have you seen that before?

A. She was also wearing that.

Q. The deceased was wearing that at the time you saw her down there in the clump of trees. Is that right?

A. That is right.

Q. And I hand you State's Exhibit 6 for Identification and ask you have you seen that before?

A. Yes.

Q. Where did you see that?

A. On the deceased.

Mr. Collier: Will you mark that for identification, please?

(An article was marked by the Clerk State's Exhibit 11 for Identification, and an additional article State's Exhibit 12 for Identification.)

Mr. Collier: Now, your Honor, here it has been testified by the witness that a pair of glass frames and a portion

of the glass of the glasses and her beret was found and I am going to propose that instead of marking each one of those individually, that we mark them as one exhibit.

[fol. 95] The Court: That may be done,—13.

The Clerk: State's Exhibit 13.

Mr. Collier: Mr. Ryan, there is some writing on there. I want you to observe it and say whether that is going to be objectionable. I don't know what it is.

Mr. Ryan: I have no objection.

Mr. Collier: I am not offering it.

Mr. Ryan: Let me see that.

Mr. Collier: I propose, in other words, that they stay in this envelope, unless the clerk has another one.

Mr. Ryan: I have no objection.

The Court: What is on the envelope?

Mr. Collier: (Handing the article to the court.)

Mr. Ryan: I have no objection to the envelope being put in——

The Court: Very well.

Mr. Ryan: —saving any objection I might have as to——

Mr. Collier: This is just a matter of marking for identification.

Mr. Ryan: Yes.

Mr. Collier: All right. Will you mark that?

(The article referred to was marked by the Clerk State's Exhibit 13 for Identification.)

Q. I hand you State's Exhibit 11 for Identification and ask you to look at it and its contents and—take them out, if you will, and look at them—and say whether or not you have seen that before.

A. Yes.

Q. What is in it?

[fol. 96] A. This (indicating) is the identification, student identification card of the Portland Traction Company, with the picture of the girl, and a half of a postcard sent by a vacation Bible school. The half bearing the name and address of the person is torn off——

Q. Enumerate the articles, that is all.

A. —and a picker's copy of Sandy Farms, a calendar, employe's identification card from the Birds Eye-Snider

Division, Hillsboro, under the name of Thelma Taylor. That (indicating) is a receipt for a purchase.

Q. All right. And, officer, who—where was this?

A. This was in the right rear pocket of the Levis on the deceased.

Q. That, then, was State's Exhibit for Identification No. 11 and was in the right rear pocket of State's Exhibit No. 6 for Identification which appears to be blue Levis. I hand you State's Exhibit 12 for Identification and ask you if you have seen that before?

A. Yes.

Q. Where was that?

A. That was under the blanket.

Q. And did Mr. Leland make any statement to you——

Mr. Ryan: If the court please——

Mr. Collier: Wait a minute until I ask the question,——

Q. (Continuing) —concerning the matter?

Mr. Ryan: I object to this. I would like to have a hearing on this in chambers, as on the other garments. I don't know what it is. I haven't any idea whether it is an issue in this case or not.

Mr. Collier: Well, the court can rule from the bench. I'll [fol. 97] show the court (handing article to the court). I am not offering it yet. I haven't offered anything yet.

The Court: I see nothing that requires a hearing in chambers at this time. You may proceed.

The Witness: A. We picked this up and wondered what that was, and after some examination, why, Leland said they were the girl's pants that she was wearing and he had torn those off so that he could use them to wipe the fingerprints off the lunch pail and thermos bottle.

Mr. Collier: Q. Now, I hand you State's Exhibit 13 for Identification and ask you to examine the contents of the envelope and say what they are.

A. This contains a frame for glasses, yellow-gold, and a little nickel plated beret.

Q. Beret?

A. Beret, or beret (pronouncing); and two pieces of lens from glasses, the largest piece and a smaller piece in here.

Q. Where did you find those?

A. This was just under the left shoulder, under the body.

Q. Now, officer, without putting these pictures in a position so that the jury can see them at this time, I will ask you to look at them, and I hand you State's Exhibit No. 1 for Identification and ask you what that is.

A. That is the scene as we found it, with the logs covering the body.

Q. I note there is a uniformed man, part of a uniformed man, with his head not showing. Who was that?

A. Sergeant Wiles.

Q. And the other person with the smaller flashlight and [fol. 98] part of his body showing, who is that?

A. That is my picture.

Q. Were you there—I believe you testified you were—right after the body was removed?

A. Yes, sir.

Q. Were there further pictures taken?

A. Yes.

Q. I hand you State's Exhibit 3 for Identification and ask you what that portrays.

A. That is the picture of the scene after the body was removed.

Q. Does that show the interior of that clump of bushes?

A. That is right, yes.

Q. Now, was there a picture taken from the outside of it, or do you know?

A. There was a picture taken when he was standing, the photographer was standing 15 or 20 feet back from the particular spot.

Q. I hand you State's Exhibit 4 and ask you if that—what that appears to portray.

A. That is the same spot where the body was found, after it had been removed.

Q. That shows what?

A. This was to bring out the type of surroundings, such as the type of trees and the density of the area.

Q. Is that a picture of the outside—of where the body was found?

A. Yes, the outside.

Q. This place where the defendant directed you to and

where the body was found, that is in Multnomah County, is it?

A. Yes, sir.

Q. State of Oregon?

[fol. 99] A. Yes, sir.

Q. Let me ask you this: You may or may not know this. The trail that Leland directed you down, as I understand your testimony, commences where Edison Street and St. Johns Avenue intersect?

A. No, it is west of that, oh, I would say about 100 feet.

Q. I see. Well, it then is in that general vicinity?

A. Yes.

Q. Are you familiar with the location of the woolen mills out there?

A. I don't know the exact location but I would say it is north of the St. Johns bridge. It is along the river.

Q. All right. And now how far would you say it is, approximately, between the woolen mills—strike that—which is the nearer to the St. Johns bridge, the woolen mills or the trail that he took you down?

A. The woolen mills.

Mr. Collier: That is all. You may cross-examine.

The Court: We will take a ten minute recess. Will you remain seated until the jurors have entered the jury room, please.

(A short recess was taken after which proceedings were resumed, as follows.)

The Court: Next question, Mr. District Attorney.

Mr. Collier: I think I had concluded.

Mr. Ryan: You are finished?

Mr. Collier: Yes.

Cross-examination.

By Mr. Ryan:

Q. You are in the detective division, are you?

A. Yes, sir.

Q. How long have you worked in that department?

[fol. 100] A. Ten years.

Q. And you are connected with the homicide squad. Do they have a homicide squad?

A. On the shift from four to midnight we work—if there is a homicide committed, we investigate it; if a burglary is committed in which our attention is desired, we investigate that also.

Q. In other words, anything that comes up in that line?

A. Yes.

Q. That falls in your department?

A. That is right.

Q. You have had experience taking statements from prisoners?

A. Yes.

Q. And did you talk to the defendant before he started talking to you and inform him that he didn't have to make a statement?

A. No, sir.

Q. Did you tell him he had a right to have an attorney?

A. No, sir.

Q. You didn't give him any information along those lines?

A. No, sir.

Mr. Ryan: If the court please, for the record at this time I move to strike all the testimony of the witness with regard to statements made by him or allegedly made by him—made to him by the defendant.

The Court: I will deny the motion.

Mr. Ryan: Q. Now, this talk that you had with Leland, did it take place all at once or was it in snatches as you went along?

A. At different times during the trip from the station to the area where we found the girl, or the deceased, and back and forth from the St. Johns precinct.

[fol. 101] Q. Did he go over it more than once with you during that time?

A. Oh, I really can't say he went over it more than once. It all depended on whether or not we wanted to ask him a question, and he voluntarily answered whatever we asked.

Q. There was always an answer to your questions, then?

A. Yes.

Q. As I understand your testimony, he picked this girl up on Fessenden Street?

A. That is right.

Q. And walked with her down to this place in the end of Edison Street? Or did he go down that way?

A. No. He said he went towards the St. Johns bridge, down by the woolen mills and then towards the area where she was found.

Q. Where on Fessenden Street did he pick her up?

A. Well, he told me it was on Willamette and Fessenden, but Willamette doesn't run through there, I don't think.

Q. He told you it was on Willamette and Fessenden?

A. Yes.

Q. And Willamette and Fessenden——

A. They don't run through there, no. Fessenden runs through but I don't know the exact cross walk where he picked her up, but it was near Fessenden where this bus was situated which picked up those bean pickers.

Q. Do you know where that was?

A. No, I don't know where that was.

Q. Do you know whether it was on the west side of the main business district of St. Johns or toward Portland?

A. I would say north of the main business district.

Q. North of the main business district?

[fol. 102] A. Yes. That would be my interpretation of it.

Q. And he walked down there. Well, now, I may have my directions mixed up. I haven't lived in St. Johns, but with reference to the Willamette River, it would be north of there?

A. No. The Willamette River runs north and south there.

Q. Well, that is where I am mixed up.

A. It would be east of there.

Q. East of that. That would be toward Portland?

A. No. As you are going, it would be in the same direction that the St. Johns bridge runs across the river to the east.

Q. You are figuring the St. Johns bridge runs east and west?

A. That is right.

Q. And then it would be farther——

A. North, to the east.

Q. That would be north and south. The St. Johns bridge runs east and west. Would it be north and south of a line through St. Johns?

A. North; I would say north of the St. Johns area, business district.

Q. That would be away from Portland?

A. That is right.

Q. Away from Portland; but you don't know for sure?

A. No.

Q. As far as you know, wherever he picked her up is unknown to you?

A. That is right.

Q. The only thing you know about this case with reference to the particular acts that you testified to here was a matter that Leland told you?

A. Just what he told me, that is right.

[fol. 103] Q. And he told you at different times in that conversation. It wasn't a continuous narrative but it was in answer to questions at various times?

A. Yes.

Q. During the course of this evening?

A. That is right.

Q. And your best recollection of what he told you was that he walked from some place on Fessenden——

A. That is right.

Q. —down to Edison Street and then down through the bushes down toward the river?

A. No. He walked towards the St. Johns bridge and down by the woolen mills, which would be towards the river, and then north from the woolen mills along the river bank.

Q. I see. Did he give you any idea of the distance that he covered?

A. No, sir.

Q. Did he say that the girl came along voluntarily with him?

A. That is right.

Q. The girl came voluntarily?

A. That is what he told me, yes.

Q. And did he tell you why the girl went with him?

A. No, he didn't say. He thought she just took a liking to him and went with him.

Q. Did he say if he had talked to her at the time he met her for any length?

A. No.

Q. Did you ask him about that?

A. No.

[fol. 104] Q. You didn't ask him about that?

A. No, I didn't.

Q. Well, the girl just, as far as you know from your experience with Leland and from no other source, he just came up and she walked along with him?

A. That is right.

Q. Now, just—Leland started to talk to you down at the police station?

A. That is right.

Q. How much of the story did he tell you down there?

A. Just that he had killed the girl and that he had covered her up with a blanket and this driftwood and that he had thought that she was a girl whose picture appeared in the paper as the girl that was missing, the girl who had gone bean picking.

Q. Is that all?

A. That is right. We interviewed him briefly there.

Q. To the best of your recollection, is that close to his very words at that time?

A. Yes.

Q. And there was nothing more at that time?

A. No, that is about all, except, well, there was a few—we asked him if he could take us to the location. He said yes. And we asked him if he would point it out. He said "That is right." And the thing he stressed particularly was that he didn't want to look at the body when he got there.

Q. He stressed that at the police station?

A. That is right; and two or three other times on the way.

Q. Then you drove out, as I understand it, you and [fol. 105] these other officers you mentioned, Officer Wiles

and you gave a list of them, about four of them, you drove out to St. Johns?

A. That is right.

Q. I presume you went out over the west side and over the bridge?

A. No. We went across the Broadway bridge, on Interstate, up Greeley, and then turned on Willamette Boulevard, and followed Willamette Boulevard to the St. Johns Bridge.

Q. While you were driving out there, where did Leland sit?

A. In the back seat of the car.

Q. Was he sitting with you?

A. No; with Sergeant Wiles.

Q. He and Sergeant Wiles were sitting in the back seat of the car and you were sitting in the front seat?

A. That is right.

Q. There were five of you in the car?

A. No; four.

Q. Weren't there four officers?

A. We had two cars.

Q. Who was in the car with you?

A. Detective Eck, Sergeant Wiles, Leland and I.

Q. Did you question him on the way out to St. Johns?

A. Yes, we did. I would ask a question, Sergeant Wiles would ask a question, Detective Eck would ask him one, and just ordinary conversation as to what took place.

Q. Do you remember particularly the questions that were asked on the way out there?

A. I can't say definitely what was asked but it was more or less pertaining to the crime.

[fol. 106] Q. Well, you see, Officer, it is important that you do remember definitely what was said and what was asked, because all you are testifying to here is the statements made by the defendant. Now are you able to do that?

A. Not exactly, no.

Q. I don't expect you to remember it word for word, you understand that; however, I do expect you to remember the general statement that was made to the defendant, or the general statement made to the defendant and his response to the particular question.

A. Well, there is—was other conversations; there was other crimes involved in this and we were asking him about those, pertaining to this stolen car.

Mr. Ryan: If the court please, I think that was deliberately put in here by the officer and the jury should be instructed to disregard that statement.

The Court: Well, it was brought out on cross examination. It was unnecessary, probably. I will strike the statement with reference to the stolen car and the jury will disregard it.

The Witness: We asked about meeting the girl and he told us about that.

Mr. Ryan:

Q. All right. How did you ask him about meeting the girl? What did you say?

A. I said "Where did you meet this girl?" He said "I met her in the St. Johns district on Fessenden Street." And we asked him if she accompanied him voluntarily. He said yes. And "What did you do?" And he related what he had done. He had taken her down towards the woolen mills and then along the river bank. And we asked him how he committed the crime. He said "I killed her with a bar." [fol. 107] Now, that was one thing that I noticed in particular, that he used that expression quite consistently.

Q. Killed her with a bar?

A. That is right. We asked him where it took place and he told us it was down in the woods there near the Oregon shipyards; and how he had been getting along, how he had been getting by while he was living around there, and he told us how he had done that.

Q. How did he say he had been living down there?

A. Well, he had stolen some blankets out of a car and made a bed out of it, and prowled several cars around the area, in the St. Johns area, and got food wherever he could.

Q. He was living down there in this place?

A. Yes. I asked him why he didn't go home. He said his folks didn't want him home.

Q. He had been down there for several days, I understand?

A. That is right.

Q. Was there anything else stated there with reference to this particular crime on trial here?

A. Yes,——

Q. You understand, Mr. Mitola, this is on your trip out in this automobile to the place.

A. Well, there is—the conversation was such that we asked him questions of that nature on the trip out and we asked him when we were walking in the woods.

Q. What I am trying to do is to break it up, for a reason of my own, when these particular questions were asked. Now, if you are able to remember, say so. If you can't remember, say so.

[fol. 108] A. No. It is hard to remember just exactly what was asked and just at what time it was asked.

Q. And it is hard to remember just exactly what was said?

A. No. It was a general conversation regarding the crime.

Q. Well, now, you testified on direct examination only from information you received from the defendant in these conversations with him, or just the general impression that you got from the whole investigation of the case?

A. No, it wasn't an impression; it was a conversation with him.

Q. Still it is hard for you at this time to relate the conversation when you heard it. I am not trying to trick you, or anything, officer, but I want to know——

A. I understand that. I told you that the conversation was in regards to the crime. The questions we asked him I related to you.

Q. Those are the only questions you asked in the car going out, as far as you remember?

A. That is right.

Q. Then you, the four of you went down from the car, down this pathway after you got out there?

A. The four of us.

Q. The whole group went down there?

A. That is right.

Q. How many were there in that group, do you remember?

A. There was officer Thompson, officer Patton, Sergeant Wiles, Detective Eck, Leland and I.

Q. Will you just describe, briefly, the type of terrain you went through there and about how far you went?

A. About how far?

[fol. 109] Q. Yes, about.

A. I would say it would be close to a half mile.

Q. What type of terrain?

A. We walked down this embankment—there is a railroad cut there—we walked down the bank, which is quite steep, across the railroad tracks, up the other side, another bank, and through underbrush which was about waist high, and woods, blackberry vines. However, there is a path that has been cut through there by people walking through that area, and as you proceed farther north, several trees, several clumps of trees, not large trees but more or less of a birch type, and in some spots rather sandy.

Q. Just as a general statement, it was pretty hard country to go through, particularly at night?

A. Yes, it was.

Q. It wasn't all level either; it was up and down?

A. That is right.

Q. Were you with the defendant all the way down or did you get kind of separated?

A. Well, I started to go ahead of him and he was right behind me when we first started. We got down to where one of these paths were located and I started to get lost, so he said "I'll lead the way." So he led the way and took us directly right to the spot.

Q. Officer Wiles and these other officers were with you?

A. Yes.

Q. They were right together with you?

A. We walked single file. We couldn't walk together.

Q. I understand. But you were within a few feet of each other?

A. That is right.

[fol. 110] Q. Then Leland didn't have any difficulty finding the place once you got down there?

A. No.

Q. He didn't look around?

A. Occasionally he would stop and survey the area.

Q. You said he went directly to the place. Is that true?

A. Well, I wouldn't say he hesitated more than a minute at any time.

Q. Did you get the impression he knew exactly where he was going?

A. Yes. Anyway, he took us a different route the second time without any hesitation.

Q. What conversation, as you related here, took place on your trip down the hill?

A. Oh, there was discussion about the warmth of the morning—it was quite warm—and as to the type of terrain——

Q. Pardon me: Relating to the statement that you testified to on direct examination.

A. Well, it was in regard to where he had spent the time down there with the girl. He said "Well, right near where I'll take you. When we get there, I don't want to look at the body." We asked him in regard to the weapon that was used, "Where did you find it?"—"Down by the river," and he pointed down in that direction. And we asked him if he could point out where he had disposed of the weapons used. He says "Well," he says, "I didn't throw them out in the river very far, but I think we can find them. I'll point them out to you tomorrow morning or in the day time." Then in regard to the time that was spent there he said "We walked up and down along the river here, river bank."

Q. This is the Willamette River you are referring to?

A. Yes.

[fol. 111] Q. And there is a railroad track nearby, isn't there?

A. Yes.

Q. About how far from the river is the railroad? Does it run parallel to the river?

A. Yes.

Q. About how far is it?

A. Oh, it is approximately 500 feet.

Q. And about where was the clump of bushes? About the middle between there?

A. No. I would say it would be closer to the railroad track; not very much.

Q. Maybe 50 or 100 feet, one way or the other?

A. Yes.

Q. So you have a distance of approximately 500 feet from the railroad track to the river and about maybe 150 or 200 feet from the railroad track to the clump of bushes and maybe another 300 or 350 feet to the river?

A. Yes.

Q. That is an accurate statement?

A. What?

Q. That is an accurate statement of the situation as it existed out there?

A. Accurate statement?

A. Yes.

A. I wouldn't say it is an accurate statement, no.

Q. That is what you testified to. I am trying to get—how far is it from the railroad track to the clump of bushes, approximately?

A. Approximately 200 feet.

[fol. 112] Q. How far from the clump of bushes down to the river?

A. About 300 feet.

Q. That is what I was trying to say.

A. Of course, I couldn't say that is accurate.

Q. No; I don't mean you measured it, but I was trying to restate what you said. Now, this conversation about the iron bar, did that take place on your way down, about being thrown out in the river or was that after you got down there?

A. I think that was after we got there.

Q. Anything else in this conversation on the way down?

A. No; I can't think of anything.

Q. Then you and the other officers went into the bushes and found this pyre, more or less, you might call it?

A. Yes.

Q. As I understand it, that it was the blanket that was partially wrapped around the body and there was some driftwood over it?

A. That is right.

Q. And before you moved anything you could see the hand, the young lady's hand, extending out from the——

A. I stooped down, got down quite low, and looked to see if I could see anything, and I could see this hand. It wasn't completely uncovered but you could see it between this driftwood.

Q. And this blanket is one of those army quilts, was it not?

A. Yes, it was.

Q. Did you go down there in the day time at all?

A. No.

Q. You have never seen the place in the day time?

A. Not after we left there with the body. I didn't go back.

[fol. 113] Q. It is pretty difficult for you to testify accurately as to the appearance of the clump of bushes, or anything like that, at night; I know it is pretty difficult to see.

A. That is right. I could give a general description but not an accurate description of it.

Q. And was this an isolated clump of bushes or was it part of a larger clump?

A. There was a large clump of bushes and the exact location was, oh, I would say, between 25 and 50 feet from the edge of this large clump of bushes.

Q. This was a smaller clump that was away from this large one?

A. No. There was an area that runs along the river bank with trees and bushes, and this particular spot was set back about 25 or 50 feet from the edge of this clump.

Q. Did you go back to St. Johns with the defendant?

A. At what time?

Q. At this time you went down there and the defendant and these other officers were there?

A. You mean when we discovered the body?

Q. Yes; you discovered the body and made the investigation.

A. That is right.

Q. Then what did you do?

A. Then we all proceeded back to the St. Johns precinct.

Q. All together?

A. Yes.

Q. The defendant along with you?

A. That is right.

Q. Did you ask him any questions on his way back?

[fol. 114] A. Oh, just pertaining to the same thing as to weapons used and things that had—crimes that had been committed, and so on, in the past, and more or less of a conversation within that—just a general conversation that we would carry on with any individual as to the weather, and so on.

Q. Was there anything that you went over in your direct examination when you gave this narrative as to how this happened? What part of that narrative did you learn about on this trip back?

Mr. Collier: If your Honor please, I think it certainly is a little difficult to ask the witness to say, "Now, you have given a narrative on direct examination. Now take those parts and tell us which was when, and so forth." I think he can ask "What did you say here and there?"

The Court: I think it would be difficult. Call his attention to specific things, if you wish to ask him when he heard them.

Mr. Ryan: I think it is proper to test his credibility, your Honor.

The Court: Well. I think the question in its present form would be difficult to answer, and a little unfair.

By Mr. Ryan:

Q. Did you talk to him about the meeting on the way back?

A. The meeting with the girl?

Q. Yes.

A. No, I don't think we did.

Q. Did you talk to him at all about the manner in which the killing was done, on the way back?

A. Yes.

[fol. 115] Q. What did you say about that? What was your question to him? I presume, officer, you still proceeded on a question and answer basis?

A. That is right. And at times he would volunteer information of his own free will and carry on a conversation with us without any question being asked. I asked him about the blankets and the place where he got those, and then there was other conversation here that doesn't pertain to this particular crime, your Honor.

Q. I don't want to go into that.

A. Well, that is part of the conversation that we had among us there at the time.

Q. My question is, what did he say about the killing of the girl? That was the question I asked you.

A. He said he used the bar, he struck her over the head, and struck her several times.

Q. What was the girl doing at that time? Did he say that then?

A. At one time she warded off this blow, and he kept striking her until she went down.

Q. Well, did she shout or scream or anything?

A. No, he didn't say anything about that.

Q. He didn't say anything about that to you?

A. Not to me, no.

Q. Now, you went back to the police station?

A. St. Johns precinct.

Q. That pretty well covers everything that relates to the crime that was told you, as far as you can remember?

A. Yes, that is right.

[fol. 116] Q. During this time Officer Wiles was with you and these other officers?

A. Yes.

Q. And was in hearing distance of your conversation?

A. Well, when we returned to the station we took a different route. Instead of going back the direction which we had gone down to the place, we came through this space which was quite open. However, it was an area which was —had several blackberry bushes in it and tall grass, and in that manner we could all walk together, more or less, or maybe two or three together and two behind, and the conversation then could be distinguished among all of us.

Q. Did you question him further after you got back to the St. Johns precinct?

A. No. At that time I spent my time talking to the District Attorney's office and the coroner's office and checking on the missing persons report, calling the harbor patrol.

Q. Did you question the defendant after that?

A. When we were returning back to the station at headquarters,—no, there wasn't much questioning then; it was more or less conversation back and forth.

Q. Did you question him at any time after that?

A. No.

Q. When did he make this statement about the purpose for which he went down there with this girl?

A. I believe that was made when we were on our way out to the scene the first time.

Q. You overlooked that in telling me about that?
[fol. 117] A. Yes, I did.

Q. Just what did he say?

A. I asked him why he had picked the girl up. I know some of his background, so—

Mr. Ryan: That isn't responsive, your Honor. I move that that be stricken.

The Court: I will strike that statement "I know some of his background" and the jury will disregard it. Read the question.

(The question was read.)

The Witness: A. (Continuing.) I asked him why he had picked this girl up. He says "Well, I intended to commit rape with her."

By Mr. Ryan:

Q. That was his very words?

A. That is right.

Q. The girl went voluntarily with him——

A. That is right.

Q. —according to your statement at that time?

A. That is right.

Q. Did he make any explanation why the girl went voluntarily with him and at the same time he intended to commit rape? Did he give you any——

A. No, he didn't tell the girl he was going to do that.

Mr. Ryan: That is all.

Redirect examination by Mr. Collier:

Q. Officer, for the purpose of the record I want to ask you whether or not that any and all statements he gave you and made to you, whether or not they were made freely and voluntarily and without threat on the part of anyone, coercion, or any promise of leniency or reward?
[fols. 118-132] A. Absolutely all voluntarily.

Mr. Ryan: If the court please, I realize that was a formal question but it was certainly a leading question, and I want the——

The Court: I will overrule the objection, or deny the motion to strike.

Mr. Ryan: Yes.

Mr. Collier: And counsel asked you if you had advised him what was said would be used against him and whether he had a right to an attorney, and all that. Do you understand that it is your duty as a police officer to advise him of any of those things?

Mr. Ryan: If the court please, that isn't a question for him to testify to.

The Court: I will sustain the objection.

Mr. Collier: Well, if your Honor please, counsel is contending for something that the law does not require.

The Court: That is a matter for me, if proper, to instruct the jury on later on in the case.

Mr. Collier: That is right. All right, then. That is all, officer.

The Court: That is all, sir.

Witness excused.

[fol. 133] Testimony of KATHERINE MARLOWE.

Mr. Collier: Please mark this for identification.

(A document was marked by the Clerk State's Exhibit 15 for Identification)

Mr. Collier: For the purpose of the record and in the presence of court and counsel I will make the statement that it will be noted that the back cover has come loose from this statement, and I will hand you State's Exhibit 15 and ask you whether or not that is a copy, a true copy of your notes?

A. Yes.

Q. And now did you make a certification on the back of it?

A. Yes, I did.

Q. And that is the last page of it, is it?

A. Yes, it is.

Q. I call your attention to the fact that the back page has come off, and was there anything between this last page that you made, your certification, and the cover?

A. No. The certification is the last page of the transcript.

Q. Very well. What time was the statement taken?

A. It commenced at 7:15 A.M.

Q. And what time was it concluded?

A. Eight A.M.

[fol. 134] Mr. Collier: You may cross examine,—wait a minute: You may cross examine.

Cross-examination.

By Mr. Ryan:

Q. What date was this taken?

A. August 11, 1949.

Q. It started when?

A. Seven-fifteen A.M.

Q. And finished when?

A. Eight A.M.

Mr. Ryan: That is all.

Mr. Collier: That is all.

The Court: That is all.

Witness excused.

[fol. 135] William D. Browne, called as a witness on behalf of the State of Oregon, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Collier:

Q. Will you state your name to the jury, please?

A. William D. Browne.

Q. And what is your occupation?

A. Chief of Detectives, Portland Police Bureau, City of Portland.

Q. How long have you been such?

A. I have been a member of the Portland police department a little over 25 years. I have been in the detective bureau about 11 years.

Q. And now, Captain, do you know Morris Leland?

A. I do.

Q. Is he here in the court room?

A. Yes, he is.

Q. And I call your attention to the date of August 11, 1949, and ask you whether you had occasion to talk to him?

A. I did.

[fol. 136] Q. And where was that?

A. In my office.

Q. And approximately what time, do you remember?

A. It was in the early morning hours of the day.

Q. Now, as I understand it, you had him brought down to your office, is that right?

A. Yes, sir.

Q. Now, shortly after that, who came into the office?

A. You and a stenographer, a court reporter.

Q. And that was Katherine Marlowe?

A. Yes.

Q. Now, you may state whether or not that at that time a statement was taken from him?

A. Yes, it was.

Q. Will you just, without at this time saying anything that he said, outline to the jury just the details of what happened?

A. I introduced him to you, said that you were chief deputy criminal deputy attorney, prosecuting attorney, and you in turn introduced him to the stenographer, and you told him that you were there to talk to him and take a statement on this matter, and advised him that it was your official duty as the deputy prosecuting attorney——

The Court: Keep your voice up.

The Witness: —to take such a statement and to prepare the case for trial.

Mr. Ryan: Pardon me, your Honor. At this time, if we are going into the background of this statement, I think

it would be proper to have the hearing in chambers with regard to the same.

[fol. 137] Mr. Collier: If your Honor please, it is elementary, of course, that it is a question for the court, and if the court passes upon it favorably to the State, then it is secondarily a question for the jury, whether it was freely and voluntarily taken. Whether we do it now or afterwards——

The Court: I think Mr. Ryan's suggestion is a proper one. We will hear further testimony with reference to any alleged statement in chambers in the presence of the defendant, Mr. Browne and other witnesses who may testify one way or the other, and subsequently we will return to the court room.

Ladies and Gentlemen of the Jury, I think probably you better retire to the jury room for the time being. We will call you in when we need you. Will you remain seated until the jurors retire to the jury room?

(Thereupon the following proceedings were had out of the presence and hearing of the jury)

The Court: Mr. Ryan, you have suggested that we retire to chambers to consider further matters with reference to an alleged statement claimed to have been given by the defendant to Captain Browne and others at the police station. Let the record show the presence of the defendant, the counsel for the defense, and representatives of the District Attorney's office in chambers, together, I assume, with witnesses who may be sworn to testify in the matter. Do you wish to proceed, Mr. District Attorney, with preliminary matters?

Mr. Collier: Yes——

Q. Now, did he give a statement?

A. Yes, he did.

[fol. 138] Q. And was that statement taken freely and voluntarily without any threats or coercion on the part of anyone, or duress, and without any promises of leniency or reward?

Mr. Collier: That is as far as I intend to go, unless the court wishes——

The Court: I am not making suggestons.

Mr. Collier: Q. Captain Browne, have you detailed all of the steps up to the time the statement was started to be taken?

A. Yes.

Mr. Collier: You may examine.

The Court: Mr. Ryan and Mr. Pelay?

Mr. Ryan: Q. What time in the morning was this?

A. Well, now, I was working quite some time. I believe it was in the forenoon, early in the forenoon.

Mr. Collier: May I interrupt?

The Court: Very well.

Mr. Collier: Q. Now, the next day, state whether or not I came down to the police station to your office with three copies of the statement?

A. You did, yes, sir.

Q. Just what did we do there?

A. Read them over out loud and gave a copy to Mr. Leland, and I had a copy and you read a copy out loud, with Mr. Leland following you along as you read and making comments as you went along, and then signed the statement.

Q. You saw him sign it, did you?

A. Yes, sir.

[fol. 139] Q. Was the statement read to him in its entirety?

A. It was.

Q. Every bit?

A. Every bit.

Q. Now, I hand you State's Exhibit 15 for Identification and ask you whether or not that is Morris Leland's signature?

A. I am not a handwriting expert. It appears to be his signature. That is his writing.

Q. Did he write that in your presence?

A. Yes, he did.

Mr. Collier: Go ahead.

Mr. Ryan: Q. Do you remember exactly what time it was?

A. No. It was in the early forenoon.

Q. Would it be closer to—it was after 9:00 o'clock?

A. I don't think—I think it was earlier than that.

Q. Was it after 9:00 o'clock when you finished taking the statement?

A. No. I would say it was early morning. I can't tell you exactly the time, because I had been working straight through for some time, long hours, and when you are working on a case like that, time isn't an important element right there at that moment.

Q. You don't know exactly what time it was?

A. No. It was in the early morning I know.

Q. How early did you get into this case?

A. I got into it when it was reported to my office. I got a phone call at home and came right down.

Q. That was—just as closely as you can, tell me what time that was. It might help you—he testified about 2:00 o'clock he was brought in. Was that right?

[fol. 140] Mr. Collier: No.

The Witness: No, it seemed to me that it was——

Mr. Collier: Wait a minute: The testimony is that he was brought into the jail at 2:00 o'clock.

Mr. Ryan: I am trying to place it in his mind.

The Witness: They got me out of bed. I know I was in bed.

Mr. Ryan:

Q. When did you first see the defendant?

A. When I came down to the office and he was brought in to my office.

Q. And it was some time after you came down?

A. Yes; because they were talking to him.

Q. Had they been out to St. Johns in the meantime?

A. Oh, yes, they had. They were out to St. Johns when I got to the station. I told them to go out to where the case was, and I went to the station.

Q. I see. You didn't go out to St. Johns with them?

A. Not at that time. I went out later.

Q. Before you took the statement did you tell him he could have an atterney?

A. I don't know whether I told him he could have an attorney or not.

Q. Did you hear anybody tell him he could have an attorney?

A. It isn't, as far as we understand, the law.

Mr. Ryan: I move that be stricken.

The Court: I will strike that portion of the answer as not responsive.

Mr. Ryan:

Q. Did you tell him he could have an attorney?

A. If he had asked me I would say yes, he could have one.

Q. Did you tell him he could have an attorney or inform him he had a right to an attorney?

[fol. 141] A. If he asked me, I did; if he didn't, I didn't. I don't remember.

Q. You don't remember telling him he could have an attorney?

A. No.

Q. Do you remember hearing anybody in your presence tell him he could have an attorney?

A. I don't recall it.

Q. As far as you know, nobody did give him that information?

Mr, Collier: Mr. Ryan, we will concede that nobody told him that.

The Court: Very well.

Mr. Ryan: Q. Did you tell him that he would have a right to be taken before a magistrate?

A. I didn't tell him that; I don't recall that I did. We would take him before the magistrate the first opportunity, because that is the law.

Q. When did you take him before a magistrate?

A. He was taken when the case was brought down to court.

Q. When was that?

A. You will have to ask the officer that took him to court.

Q. Did you tell him he had a right to be taken before a magistrate before he made a statement?

Mr. Collier: We will concede that nobody told him he had a right to be taken before a magistrate before he made a statement.

The Court: Let the record so show.

Mr. Collier: I mean nobody told him that prior to the taking of the statement.

Mr. Ryan: Q. Did you tell him that he didn't have to say [fol. 142] anything?

A. I didn't, no.

Q. Did anybody in your presence tell him?

A. I have a stock phrase that I usually use—I say "stock" in the general acceptance of the term—that it is up to them whether or not they wish to make a statement.

Q. Do you tell them they don't have to make a statement?

A. I say it is up to them whether or not they wish to make a statement.

Mr. Collier: The statement would be the best evidence of the fact.

The Court: Well, he may continue with the questioning along this line.

Mr. Ryan: Q. You don't tell him he doesn't have to make a statement, in so many words?

A. Sometimes I say—we don't tell them whether they do or whether they don't.

Q. Did you say that here?

A. I don't know whether I did or not.

Q. You say that you have a stock phrase that you use in a kind of matter of routine?

A. No, it isn't routine. Each case is individual; but we usually tell them—I usually do; I would say I do it all the time—that they can or they can't, whichever they wish, if they wish to make a statement or not.

Q. Do you tell them what they say will be used against them?

A. They are usually advised that, although it isn't necessary.

Q. Did you tell him in this case?

[fol. 143] A. I think perhaps I did, yes.

Q. Are you sure?

A. I usually do.

Q. What words did you tell him?

A. Well, that the statement can be used for or against him.

Q. You would say the statement could be used for or against him?

A. Yes, sir.

Q. You told him that?

A. Yes, sir.

Q. Do you know if he had been before a magistrate when he signed the statement?

A. Not to my knowledge.

Q. And that was the next day, was it not?

A. Yes.

Q. So he was in jail all day; though there was a magistrate available?

Mr. Collier: After he had given the statement.

The Witness: I say not to my knowledge.

Mr. Ryan:

Q. As far as you know.

A. As far as I know.

Q. You are in charge of the detective bureau?

A. Yes.

Q. And you were personally in charge of this case?

A. Yes. I have 104 men it that division. I don't follow the little detail of every case.

Q. I understand that, Captain, but as I understand it you were asked in the early morning hours to come down to the police station on this particular case.

[fol. 144] A. On all major crimes.

Q. Well, this was a major crime?

A. Yes.

Q. So it came to your personal attention?

A. Yes.

Q. And you were directing the officers in a general way?

A. Coordinating, yes.

Q. And you would know, say, in your position, or should know, what was being done with the defendant during that time?

A. The officer that handled the case is better qualified to answer that than I.

Q. Do you see to it that the defendant's rights are protected with regard to going before a magistrate?

Mr. Collier: I object to that, your Honor. There is no legal duty on his part to so do. I don't see how it could affect the testimony. The Supreme Court has said an officer doesn't have to do that. How can it be used against the officer? The court said "That isn't your duty; you don't have to do it." After the court laid down the rule and says it is the duty of the magistrate, how can an officer be criticized or how can it affect the testimony in any way?

The Court: I tell you how: In connection with the determination, such as this, of the freeness or voluntariness and the circumstances under which the statement was given by the defendant. That is the only possible relationship there could be, as I see it.

Mr. Collier: I appreciate your thought on that. Let me say this: If that is true and the officer doesn't have to tell him anything about his rights on whether he has to make a [fol. 145] statement or not, I don't see how it could affect the freeness and the voluntariness. In other words, you can take a statement from a person without telling him the time of day; that statement can still be freely and voluntarily made.

The Court: No question about that.

Mr. Collier: How can it affect that angle of it?

The Court: What did the officer do and what did he not do, whether he was required to do it by law or not at the time the statement was taken? Did he adhere strictly to the legal requirements imposed upon him and go no farther, or did he lean over backwards to advise the defendant of any possible prejudice there might be in issuing the statement. You may inquire.

Mr. Ryan: Will you read the question, please?

(The question was read.)

The Witness:

A. Those are my orders to the relief commanders, that all men shall be taken before a magistrate.

Q. Do you know when he was taken before a magistrate?

A. I couldn't say for sure.

Mr. Ryan: Does the record show that, your Honor?

The Court: I was going to answer myself——

Mr. Collier: The record doesn't show?

Mr. Pelay: No; I just looked at it.

The Court: You don't know the hour that the statement was taken?

Mr. Collier: Oh, yes; we have it right there.

The Court: What is your question?

Mr. Ryan: I wondered when he was taken before a magistrate.

The Court: Oh, that I don't know. You don't either?

[fol. 146] Mr. Collier: No, I don't.

The Court: The Captain doesn't know?

Mr. Collier: We will concede that he was taken before a magistrate after the statement was taker.

Mr. Ryan: And after he signed it?

Mr. Collier: That part I don't know.

The Court: Next question.

Mr. Ryan: That is all,—one more question:

Q. What was the defendant's condition at the time he made this statement?

A. About the same as it is now.

Q. You mean he wasn't any more excited than he is now?

A. No; nor was he any more excited.

Q. It didn't seem to make a great deal of difference to him?

A. No.

Q. Had he been up for a long time, or do you know?

A. I don't know how long he had been up. The court records show he was arrested about 2:00 o'clock in the morning. He perhaps was up about the same length of time that I had been. I had been to bed from about 10:00 o'clock to 2:00, when I was called.

Q. You are certain you were not in court with him when he appeared before a magistrate? Are you sure of that?

A. I may have been in the court room, but I don't believe I was. I may have been, but I don't believe I was. I am in and out of that court room on a number of occasions. I wouldn't say that I was or wasn't.

Mr. Ryan: That is all.

Mr. Collier:

Q. Do you know whether or not he had breakfast prior [fol. 147] to giving the statement?

A. Yes; we went out and got him something to eat.

Q. Now, Captain, for the purpose of the record, not that I think it has anything to do with the admissibility of this confession, but purely for the purpose of the record, I wish, Captain Browne, you would start at Page 3 of that statement; start reading where the name "Mr. Collier" appears, to and including Line 3 on Page 5; starting where it says "Mr. Collier."

A. (Reading)—

> Mr. Collier: Mr. Leland, the young lady sitting here at the table is Katherine Marlowe. She is a court reporter and would like to take a statement from you as to the death of this girl whom we know as Thelma Taylor. Now, you will be willing to give us a statement? I understand you have already told the officers about it?
>
> Mr. Leland: Yeah; but this statement will be used on the trial, right?
>
> Mr. Collier: Pardon me?
>
> Mr. Leland: This statement can be used at the trial?
>
> Mr. Collier: That is right. I will explain to you: You do not have to make any statement at all. And if you do make a statement it must be made of your own free-will and voluntarily on your part, without any threats or coercion on the part of anyone. And if you make the statement it can and will be used against you. Now, do you understand what I have said?
>
> [fol. 148] Mr. Leland: Yes; I understand what you mean.
>
> Mr. Collier: And knowing that, will you make a statement?
>
> Mr. Leland: Anything I say in here may be used against me during the trial?
>
> Mr. Collier: That is right, sir; the same as the statement that you have made to the officers.
>
> Mr. Leland: Except that it isn't a written statement with my signature on it.

Mr. Collier: I understand your statement to the officers was verbal, is that right?

Mr. Leland: Yes; I told them, I told them I could take them to a body.

Mr. Collier: That is right; and you further told them that you had killed the girl, is that right?

Mr. Leland: Well, I wouldn't say that. If I am going to make this statement, we might as well start from the beginning, there is no use starting like that.

Mr. Collier: That is right; I want you to tell it the way you want to do it. But do you make a statement?

Mr. Leland: Well, in this statement do you want me to tell the whole story from the beginning?

Mr. Collier: That is what I would prefer.

Mr. Leland: To the end?

Mr. Collier: That is right.

Mr. Leland: There is so many things I have got to [fol. 149] remember yet. Well, it was last Thursday morning I believe you got that missing report, if I am not mistaken,"—(interruption by)——

Mr. Collier: That is all.

The Court: No further testimony?

Mr. Collier: No.

The Court:

Q. Captain Browne, do you know how long this man was talked to before this statement was signed by him?

A. Well, now, I will have to go by what was said about 2:00 o'clock.

Q. You came down at 2:00 o'clock?

A. I was called at that time.

Q. And you got out of bed and went down and the defendant was there at that time?

A. No, sir. Sergeant Mitola called me and told me that a man was in there who had confessed to murdering a girl and hiding her body down along the river. And I said to him immediately to get some lights, portable lights, and take the man with them and have him point out the spot where the body was. I said "I'm going down to the station," because I wouldn't know the exact place to go out

on the river and I would be going alone, and rather than hold up the investigation until I got there I told them to go with other officers out to the site and to come back and I would be at the station.

Q. What time did you meet them at the station?

A. It perhaps was an hour and a half later, perhaps around 4:00 o'clock, I would say.

Q. When was the statement signed?

A. Around. Mr. Collier says. 7:15. I know it was early [fol. 150] in the morning.

Mr. Collier: The court wanted to know when it was signed.

The Court: Yes; about 7:15?

Mr. Collier: No.

The Witness: It was taken in the early morning hours. It was early in the morning.

The Court:

Q. Was it taken in your presence?

A. Yes.

Q. That was in the early morning hours sometime?

A. Yes. It was—I don't mean two or three or four o'clock in the morning. I think it was a little later than that but in the early part of the day.

The Court: Mr. Collier; When was the statement signed?

Mr. Collier: The statement was signed on the following day, on the 12th.

The Court: When was the statement taken?

Mr. Collier: The statement was taken,—it started at 7:15 o'clock, as testified by the stenographer, and it was concluded at 8:00 A. M.

The Court:

Q. Were you there during the entire time, Captain Browne?

A. Yes.

Q. Who else was present?

A. Mitola came in and went out again.

Q. Was Mr. Collier present?

A. Mr. Collier was there all the time.

Q. And, of course, Katherine Marlowe?

A. Yes.

[fol. 151] Q. Anyone else present?

A. Officers came in and out; at that time of day the functions of the bureau are starting and there are important calls coming in, and I was disturbed two or three times.

Q. Was any statement made to the defendant that it might be better for him to sign a confession, or anything of that kind?

A. No.

Q. No promises——

A. No, sir.

Q. —of any reward——

A. No promises whatever, no, sir.

Q. —or lenience? Any further testimony?

Mr. Ryan: I want to put the defendant on for this purpose only.

The Court: I take it, then, that he must be sworn.

Mr. Ryan: For this purpose only.

The Court: Well, not by the court. I don't know just what the effect would be of committing him——

Mr. Ryan: Well, I want that understood.

The Court: The court can give you no such understanding. The District Attorney may agree with you. I am not committing myself at this time. You may be right. I don't know.

Mr. Collier: I don't know just exactly what plans you have in your mind, but I want to point out that if you put him on the stand here you are in no way, as I see it, obligated to put him on the stand in front of the jury; but if you do put him on the stand here I have a right to interrogate him in detail as to everything he testified to on direct.

[fol. 152] Mr. Ryan: In here?

Mr. Collier: Yes.

Mr. Pelay: Confined to this purpose only?

Mr. Collier: He said that statement can be used against him, right there before the jury. I am not going to say.

The Court: Of course, Mr. Pelay, it would be my present idea that if the defendant is sworn in here in an attempt to challenge this statement, that everything connected with that statement could be inquired into on cross examination by the District Attorney.

Mr. Ryan: Well, I think I won't put him on. Under the circumstances, I have changed my mind. Now I have a statement to make, your Honor:

I move at this time for the exclusion of the confession. First, it is evident from the testimony here adduced, and the testimony of Officer Mitola, that the defendant had been awake since the early morning on the 11th and was still awake at 2:00 o'clock when he came in to the jail. And instead of being given an opportunity to sleep he was—the questioning continued until approximately 7:00 o'clock, at which time he was ready, because of his fatigue and highly nervous state, and because of other factors, which indicate his mental incapacity, to make this statement. Therefore, it was not a voluntary statement. There was—the reason for the speed and hurry on this, in my opinion—and I think it is a fact—was that they wanted to have him make a statement while he was in the mood and before he had an opportunity to get counsel or to appear before a magistrate for a hearing, at which time, upon reflection or upon advice, he [fol. 153] would be aware of his rights not to make a statement. I move on that ground. I have some other grounds.

Mr. Collier: Well——

The Court: Just a minute before considering the motion for exclusion of the confession. I would like to revert to this previous matter of how far the defendant would be subjected to cross examination in here if he took the stand in an effort to challenge this confession. I don't want to preclude him from doing that. However, that is my understanding at this time. I would like to know if the District Attorney concurs in that understanding.

Mr. Collier: Yes.

The Court: That being the case, why, that would be my ruling.

Now, as far as the exclusion of the confession is concerned, there is no showing made at this time that there was any promise extended to the defendant, any encouragement

given to make a confession, any suggestion that he would be dealt with more leniently if he gave it; no showing of any force or threat or compulsion, or any physical impairment or mental impairment that would preclude in any way the statement having been made freely and voluntarily. All of this, you understand, I know, can of course be gone into before the trial jury in an effort to show what you now contend before me, that it was not a free and voluntary confession. You have a perfect right to take it in the court room. But so far as your first motion is concerned, I am prepared at this moment to deny it, unless you have something further.

Mr. Ryan: With regard to the signing of this confession: An interim passed during which time he could have been [fol. 154] taken before a magistrate, and he was not; instead of that, he was allowed to sign this confession, although he was in jail for over 24 hours before the signing of the confession. And on those grounds I think the confession should be excluded. He was not taken before a magistrate, and the magistrate probably, in his own good judgment, would have advised him to get counsel. Therefore I move on that ground.

The Court: It is my present understanding that there is no requirement on the part of the District Attorney or deputy or any police officer to take the defendant before a magistrate prior to a statement of this kind having been issued. I am inclined to think that that possibly is a matter for the consideration of a trial jury in determining and evaluating—in determining the credibility of any such confession and in evaluating it as a free and voluntary document, although I am not entirely committing myself to that latter proposition. Mr. District Attorney, what is your opinion on that matter as to the necessity for taking the defendant before a magistrate before a statement is taken?

Mr. Collier: As far as the law is concerned, when the—I don't understand that it is their duty to take the defendant charged with a crime before a magistrate before a statement is taken. Furthermore, the only question that can be involved here before the court is whether or not the thing was freely and voluntarily taken. That was the question; and that he signed it, still prior to going before a magistrate, doesn't add anything.

The Court: As I am presently informed, your second ground for exclusion would be denied.

Mr. Ryan: I move the court for the exclusion of this con-
[fol. 155] fession on the ground and for the reason that Captain Browne testified in answer to my question as to whether or not he told him this matter could be used against him, he said "I informed him this matter could be used either for or against him." I call your Honor's attention to the exact words that he used in answer to that question. I also call your Honor's attention to the fact that at least three times prior to the trial of this case, both—twice by mention in open court and once personally—I asked to see the confession, and on those grounds and particularly with reference to the fact that Captain Browne specifically advised the defendant that he could use this confession, could have the confession for his own use in the trial of the case. I move for the exclusion of the confession.

Mr. Collier: He didn't tell him that.

Mr. Ryan: That was in the record.

The Court: One minute: The testimony of Captain Browne finally came down to the proposition that the defendant was advised that the confession could be used, and apparently the testimony of the defendant as reported from the excerpt of the confession read would indicate that he himself had made such inquiry and was definitely advised that it could be so used. I think "For or against him," or whatever the terminology employed was, it was in effect advising him that the statement that he was about to make could, and probably would, be used in the trial of the case. Have you anything further, Mr. District Attorney?

Mr. Collier: Well, except to say that in The State of Oregon v. Wardell Henderson, 182 Or., there were a number of statements read, statements taken from the defendant over a period of days, and they were taken back in Phila-
[fol. 156] delphia there by one of the agents of the F.B.I., and he at no time was taken before a magistrate.

The Court: I would like defense counsel to indicate any authority in support of the contention that an individual must be taken before a magistrate before a statement is made.

Mr. Ryan: Well, I think that the rule—I am trying to get the exact wording of our statute—I think it says he shall be taken forthwith before a magistrate. That is my recollection.

Mr. Collier: It doesn't say before a statement is taken, though.

Mr. Ryan: Well, that means immediately.

The Court: I think that is what it says, substantially.

Mr. Ryan: All right. "Forthwith" doesn't mean tomorrow or the next day. The theory upon which we have—the reason for a preliminary hearing is to avoid what happens in, I would say, 80% of the criminal cases that are investigated in the police department—and I don't blame the police officers for making those investigations in that manner; they are dealing with a tough problem—but in order—if the constitutional right against self incrimination is to have any meaning at all, the court must give the strongest consideration to the requirement that the defendant be taken forthwith before a magistrate. And if by virtue of the fact they hurry up an examination and then allow him to stay in jail through the business day, allow him to be in a position where a magistrate is available, and I think in my interpretation of it, "forthwith" would mean upon arrest. That would be my interpretation. They have never done that. It seems to me that if we are going to give any reality [fol. 157] to the meaning of that statute we are going to have to take the McNab case—the federal officers are now instructed before they make any questioning that he is to be taken before a commissioner and arraigned or given a preliminary hearing. Now, I think we are bound by the same rule that the McNab case sets out, and I think the United States court has enunciated their theory to be that where the state statute is similar to the U. S. statute, then, in order that the constitutional provisions of the United States constitution, as well as the state constitution, be given effect, that no question—nothing be done until he has been brought into open court and told of the charge.

The Court: In other words, you think that immediately upon arrest, or at any rate forthwith, that one who is accused of a crime must be taken before a magistrate before any interrogation is made?

Mr. Ryan: Yes, that is my opinion.

The Court: And that thereupon, of course, the magistrate is required to advise him of his rights and that any statement he makes will be used against him.

Mr. Ryan: That is right.

The Court: The fact that such advice was given to the defendant prior to making the statement, although it is not required under the statute, does not in your opinion alter the application of that rule?

Mr. Ryan: No. And I want to point out here, I think it should not alter that rule, when a man charged with a crime goes into the detective office, he is there alone. Now, whether [fol. 158] or not there is any coercion used at that time, a person, particularly a person belonging to the class that the defendant in this case belongs to, goes in there with a great deal of fear and he has apprehensions of a very strong sort that he might be subjected to physical punishment before he makes a confession. He also goes in there ignorant of his rights, and any formal matter which can be given either with great caution or can be given in a cursory way, does not have any effect on him because he has nobody to appeal to; he is not in open court. The only persons he sees there are his own enemies, as I might state. He is afraid of the officers and District Attorney. He is a victim, he is held there, he has nothing to appeal to. However, when he goes into open court and before a magistrate, the dignity of the law steps in; he knows now that what this man says means something because it is done in open court or it is done in such a manner that he can say "Now, this man is not interrogating me; this man is not prosecuting me; this man is the judge." I think the only thing that is going to be of any effect in any of this question of taking statements is if the matter is given in open court as a matter of public knowledge and not something done in the police station, in the detective room. It has been my experience that, while I don't know that overt coercion is often used, I think it has been used. I think most persons who have been charged with crimes are afraid of it, and there is no reason, if these confessions are in reality—and I say in reality; now I want that clear—if these confessions are in reality voluntary, why they should not take them before a magistrate and then let him make his statement. I think that that is of the great-

[fol. 159] est importance. But if they rush it through, like they did in this case—this kid had been up since early morning. If he was a normal person and had been subject to a great mental strain all through the day; if he was, as apparently the officer stated, unexcited by it, maybe that didn't affect him so much. But here they go and question him all through the night and then pull this confession. I think they never used any physical force in this instance, but they didn't comply with the law in any event. And then even after they had taken the confession, instead of giving him an opportunity before he signed it and doubly bound himself, they didn't give him a right to go to court, where the court would have advised him to get counsel.

Now, I am convinced that the McNab case and the other cases and this one that you mentioned the other day, the one in Colorado——

The Court: I know what you mean.

Mr. Ryan: —even there the court with reluctance followed the rule because in Colorado they didn't have the obligation to bring them before the magistrate directly; but the purpose they are trying to effect is to get rid of the star chamber proceedings, which are really extra legal. That is the reason for the preliminary hearing, to avoid star chamber proceedings. And I don't believe you are ever going to have any real effect to the constitutional provision against self incrimination until the courts require a hearing in open court before any questioning is done of the defendant.

The Court: Mr. Ryan, you have two things that are realistic that would negative your theoretical argument, which [fol. 160] is good. The first is that this confession is merely an extension in writing of statements that the defendant previously made to the officers. It is a continuation of the statement which he himself initiated. You have, second, the fact that the defendant was not run down by the police and kept there at the point of a gun, but he himself came to the officers and stated what he had done and, in effect, at any rate, volunteered the statement that followed——

Mr. Ryan: May I interrupt?

The Court: —because the confession, as I say, is merely

a continuation and a reduction to writing in greater detail, and more comprehensive, it is true, than previous statements that he himself freely stated he wanted to make and did make to the officers.

Now, this idea that the presence of officers in the police station and the overwhelming majesty of the law would so frighten the defendant that he would make a statement, really is just entirely lacking in substance in the light of the reality of the situation. I would be inclined to overrule——

Mr. Ryan: Before you do that, I want it understood that the defendant was in custody on another charge, not on this particular charge. He didn't come into the——

The Court. For larceny of a car.

Mr. Ryan: That is right.

Mr. Collier: That is right.

Mr. Ryan: He was in custody at that time——

The Court: Yes, I understand.

Mr. Carskadon: For the sake of the record, is it your contention, Mr. Ryan, that any time the police apprehend [fol. 161] anyone for any crime that they must, before they fully investigate the case and have sufficient evidence to take before the committing magistrate, that they must take him before the committing magistrate?

Mr. Ryan: Absolutely.

Mr. Carskadon: Prior to the full preparation of their case?

Mr. Ryan: Absolutely. They shouldn't question the man until their case is fully prepared.

Mr. Collier: Let me make an answer about the other charge. In State v. Henderson on Page 173 of 182 Or. it says: "The fact that the confessions were made while the defendant was in a custodial institution does not deprive them of free and voluntary character"—citing other cases. "In the present instance, the defendant, at the time of the purported confessions, was not a prisoner of any civil officer. He had surrendered himself into the custody of those who had him in charge. The fact alone that the defendant was held in close confinement did not render his confession incompetent."

The Court: I would overrule the later objection made by counsel for the defense.

Mr. Ryan: If the court please, I direct your attention to the motion I made to suppress this confession on the ground that the officer testifying here very clearly stated that he informed the defendant that he could have this confession to use for him or against him, and that we made that request to the District Attorney's office and we made two motions here in court, and it is a matter of importance to us. If we had had that available, perhaps my opening statement would have been different, and the—and the [fol. 162] matter of my conduct of this case would have been different, and I think it should be excluded.

The Court: I know of no legal requirement that would require the District Attorney's office to turn over to defense counsel evidence which it proposes to offer in the trial of this case. I disposed, of course, previously of the objection upon that ground, that is, at the time the motion was made for permission to see the confession. I will say at this time, however, that if the defense attorney desires an additional recess in order to go over this confession after it has been offered and received, I would certainly grant it, in order that you may be fully prepared to cross examine or take any further action you desire with reference to it. But I will deny the motion for the suppression of the confession upon the last grounds stated.

Mr. Ryan: In order that the record may be clear, in the event this confession is introduced at this time, and on the grounds just stated, that we made this motion for the confession prior to commencing our trial and particularly prior to making the opening statement, which was of great importance to me in that regard, what I wanted it for; and on the further ground that Captain Browne in testifying as to the conversation which induced the defendant to make this confession stated to him in so many words that it could be used by him in his favor or against him—by the State against him; I will move for a mistrial on that ground.

The Court: I will deny the motion.

Mr. Collier: This statement was made out of the presence of the jury. You might note that in the record.

[fol. 163] The Court: Is that all?

Mr. Ryan: Yes.

Mr. Collier: Yes.

(Thereupon a short recess was taken, after which proceedings were resumed, as follows, in the presence and hearing of the jury.)

Mr. Collier: Mr. Reporter, will you read the last question and answer?

The Reporter: (Reading)—

Q. Will you just, without at this time saying anything that he said, outline to the jury just the details of what happened?

A. I introduced him to you, said that you were chief deputy criminal deputy attorney, prosecuting attorney, and you in turn introduced him to the stenographer, and you told him that you were there to talk to him and take a statement on this matter, and advised him that it was your official duty as the deputy prosecuting attorney * * * to take such a statement and to prepare the case for trial.

Mr. Collier:

Q. Now, that was—I don't know if I asked you in the presence of the jury whether the court reporter, Katherine Marlowe, was there present.

A. Yes, sir.

Q. And now, did he thereafter proceed to make a statement in your presence to both yourself and me and in the presence of the court reporter?

[fol. 164] A. He did, yes, sir.

Q. And was that statement freely, voluntarily, without threat or coercion on the part of anyone, or promises of leniency or reward, taken?

Mr. Ryan: I think that was a leading question, very definitely.

The Court: Well, it probably was, but it is an acceptable form of the question and it may be broken down by the defense counsel, and State's attorneys as well, into the facts upon which he really bases his opinion, if that is to be to the effect that it was free and voluntary. You may answer.

The Witness:

A. He did; yes, sir.

Mr. Collier:

Q. Now, have you given everything that happened from the time that I arrived there until the time we started to take the statement, as far as you know?

A. Well, the principal,—yes, sir.

Q. And now, had Mitola just brought him in——

A. Yes, sir.

Q. —to your office? And how long, about, prior, before I came there?

A. Well, it was almost about the same time; a very few minutes.

Q. And that was just after Mitola got back from St. Johns with the defendant?

A. That is right, sir; yes, sir.

Mr. Collier: At this time, your Honor, I would like to offer State's Exhibit 15 for Identification in evidence.

Mr. Ryan: If the court please, I am objecting to it on the grounds, first, that the confession was taken after the defendant had been awake from early morning, Friday morn-[fol. 165] ing, kept awake all that night, and——

Mr. Collier: There is no such showing here.

The Court: No; that is true. At this time the record does not show those circumstances.

Mr. Collier: Oh, yes; and may I interrupt counsel? I should have asked a question or two more.

Mr. Ryan: Go ahead.

The Court: Very well.

Mr. Collier:

Q. Now, the following day, you may state whether or not that I came down to your office at the police station with the transcribed statement.

A. Yes, sir; you did.

Q. And how many did I bring?

A. Three, sir.

Q. Now, what did we do there?

A. One was given to the defendant, one was retained by yourself, and one was given to me, and you read the statements aloud. The defendant was reading his copy along with your reading, and I was reading mine.

Q. And was the statement read throughout in its entirety——

A. Absolutely.

Q. —to the defendant? You may state whether or not the defendant signed this statement.

A. He did, yes, sir.

Q. Was that in your presence?

A. Yes, sir.

Q. I will ask you to look at Page 44 of State's Exhibit for Identification No. 15, and state whether or not that appears [fol. 166] to be the signature that he signed in your presence.

A. Yes, sir; it does.

Q. All right. Thank you. Now I call your attention to Page 8 of State's Exhibit for Identification 15 and you will note that on the last line on Page 8 that the word "Madison" is stricken out in ink and below it "Edison" is written and initialed "M. L." Who did that?

A. Morris Leland.

Q. All right. I call your attention to the following page of the same exhibit, Page 9, where "Madison" is again stricken out and "Edison" is written in and the signature, the initials "M. L." put there. Who did that?

A. Morris Leland.

Mr. Collier: Now I offer Exhibit 15.

Mr. Ryan: I object to it on the grounds heretofore mentioned. If you want me to go into them at the present time——

The Court: Well, let the record show that the court recalls the objections previously made to the admission of this particular Exhibit 15 and that it is unnecessary to restate those so far as the court's information and the point of the objection are concerned. The objection will be overruled. The exhibit is received.

Mr. Collier:

Q. Now, Captain, later on that day did you go any place with the defendant?

A. I did, sir.

Q. Who was with you?

A. Detective Sergeant Purcell, Detective Fox and the defendant.

Q. And where did you go?

[fol. 167] A. To the scene of the murder.

Q. And the defendant pointed it out to you, did he?

A. He did.

The Court: May I ask if there are any witnesses in the court room? Are there any witnesses in the court room who are to testify, or in chambers?

(No response.)

Mr. Collier:

Q. Now, at that time when you took him down there did you have in your possession the instrumentalities of the crime?

A. Not at the time we took him down there, no, sir.

Q. What did the defendant Leland do in that regard?

A. He took us from the scene of the crime to the river bank, quite some distance, and pointed out a spot where he stated he had thrown the weapons used in this murder.

Q. Go ahead, Captain, and tell just what happened, in the order that it happened, if you will.

A. I called the harbor patrol and ordered the boat to come up to the scene with an electric magnet, in an endeavor to pick out the spot where the weapons were thrown. We worked with the harbor boat for perhaps an hour and we were not getting any—we were getting a lot of wire and cable and such out of the river——

Q. May I interrupt you: Was the defendant present then?

A. Oh, at all times. He was directing the operations of the boat as to where they located the magnet, as to where it probably would be, because he took us to the bottom of the bank and showed us how he had thrown the weapons and [fol. 168] he showed us the manner in which he threw them in, overhanded or sort of, oh, just tossed them out in the water. We couldn't find them with the magnet because so much other metal had been thrown in there, old cables and such. It was an old log boom used by the shipyards during the war to tie up logs and such and there was considerable iron cable in there; so the magnet was of no value. So we had to strip down and go out in the river and wade

around with a rake to find it. After about an hour of wading around in the river we were unable to find it. And Mr. Leland told us that, he says "I believe I'm mistaken; I believe I have mistaken the piles." There are several piles that they tied logs up to and he said "I believe I'm mistaken in the pilings; I believe it is down here a ways and I was by a bush when I threw those out," and he says "I think it was this bush and it is out here." And he took us about 20 or 30 feet down the river by some bush where there were two pilings, similar but a little different. So he says "I believe it is behind those two." So Sergeant Purcell waded in the river and with the rake recovered the bar and the knife used in the killing of the girl and Leland identified them as being the ones. He had identified them to us several times, especially the bar, because he said it has—because of the characteristics of the machine—of the bar. He had described it to us. He said "You'll find a white handkerchief around it. I wrapped a handkerchief around it." When we recovered it, the handkerchief was still on it.

Q. After they were recovered from the river you may state whether or not he identified them as being the weapons that he used to kill the girl.

[fol. 169] A. He did, sir. We picked out a smaller bar and he said "That isn't the one. There will be a white handkerchief on this one and it has this knob on the end of it.

(Certain articles were marked by the Clerk State's Exhibits 16 and 17 for Identification.)

Mr. Ryan: If the court please, I object at this time to showing these exhibits in the presence of the jury on the ground that it — purely cumulative; doesn't prove anything that has not already come out in this case and been admitted up to now.

Mr. Collier: I cite the case of State v.——

The Court: That wouldn't be a legitimate objection. You may proceed.

Mr. Ryan: I want the record to show that we object to them as they are calculated only for the purpose of arousing the passion and prejudice of the jury.

The Court: Let the record so show. What is Exhibit 16 for Identification, the bar?

Mr. Collier: Yes, sir.
The Court: You may proceed.

Mr. Collier:

Q. I hand you, Captain Browne, State's Exhibit 16 for Identification and ask you to observe it and state whether that is the bar that was taken from the river at the direction of Morris Leland and thereafter identified by him as being the bar which he used to kill the girl?

A. It is; yes, sir.

Q. I hand you State's Exhibit 17 and ask you to look at it and state whether or not that is the knife which was taken from the river at the direction of Morris Leland and [fol. 170] thereafter identified by Morris Leland as being the knife that he used in killing the girl.

A. Yes, it is, sir.

Mr. Collier: At this time I offer in evidence State's Exhibits 16 and 17.

Mr. Ryan: May I see them a second, Mr. Collier?

(The exhibits were handed to counsel.)

Mr. Collier: One more question——

Q. It will be noted that there is a handkerchief at one end of the bar. Is that the condition that the bar was in at the time it was recovered from the river and thereafter identified as the bar by Morris Leland?

A. It is, yes, sir.

Mr. Collier: Very well.

The Witness: Except that it is dry now. It was very wet then. Same condition otherwise.

Mr. Ryan: I object to the introduction of this knife because there is blood on it, which is left on there purposely in order to incite the passion of the jury. It has no bearing on the case. I ask that the blood be cleaned off.

The Court: You are referring to Exhibit 17?

Mr. Ryan: Yes; I believe that is the number.

The Court: I will overrule the objection. It will be received in evidence.

Mr. Collier: Are both the exhibits received, your Honor?

The Court: Sixteen wasn't objected to.

Mr. Ryan: I objected to it before, but I don't think there is any blood on it, your Honor.

[fol. 171] The Court: Both 16 and 17 will be received in evidence.

(The articles referred to were marked by the Clerk State's Exhibits 16 and 17.)

Mr. Collier:

Q. And, officer, was the knife in the scabbard at the time of its recovery?

A. Yes, sir, it was; yes, sir.

Q. Now, you may state whether or not he showed you where he picked the bar up.

A. Yes, sir, he did. He took us—after we had identified it I asked him where he got the bar and he took us by another circular route to a point, and we had a little difficulty in finding it, because there was a lot of underbrush and such down there, and he led us to the spot where he found it, and he said he had the girl out walking around there the day previous and that he had picked the bar up at that time and took it along with him.

Q. Were there other bars there at that place?

A. Yes, there were two or three other ones.

Q. Similar?

A. Yes, similar, yes, sir.

Mr. Collier: You may cross examine.

Cross-examination.

By Mr. Ryan:

Q. Officer, during the day time you went down there?

A. Yes, it was, sir.

Q. What time of the day, do you recall, approximately? I don't mean exactly.

A. Shortly after the statement was taken.

Q. It was after nine o'clock, was it?

[fol. 172] A. Yes.

Q. Now, as I understand it, Captain, the statement was taken about 7:00 o'clock in the morning?

A. Yes, sir.

Q. And you had been working on the case since about 2:00 o'clock that morning?

A. Yes, sir.

Q. You were called by the——

A. May I correct that: I said "Yes, sir." You said I had been working on the case. I had been at my office and the officers were out there. I was not particularly working on it.

Q. But you were down there because of this case?

A. Yes.

Q. They called you out of your bed at night to come down there?

A. Yes.

Q. And you are in charge of the detective bureau?

A. Yes.

Q. And as I understand it, that you work on all major cases, that is part of your duty to take personal charge of it?

A. I feel it is my responsibility to be there on all major crimes. I don't take the absolute control of charge of it. I have lieutenants and sergeants that do that; but I feel it is my responsibility to the people to be there during major crimes.

Q. As I understand it, further, that this confession that you identified here was taken right after Officer Mitola brought Leland back from the trip to St. Johns they made that night?

A. Approximately five hours after his arrest, yes, sir.

Q. As far as you know, Morris Leland hadn't been asleep [fol. 173] during that day?

A. No, I don't believe he had, sir.

Q. As far as you know he hadn't been asleep at during the previous day?

A. I have no way of knowing that.

Q. Did you ask him any questions?

A. He told me he had slept in automobiles since the time of the murder. He hadn't gone home or any place. He had slept in automobiles.

Q. Since the time of the murder?

A. Yes.

Q. Did he tell you whether he had slept any that day?

A. He didn't.

Mr. Collier: What day do you refer to,—"that day."
Mr. Ryan: The day he took the confession,——

Q. Did he appear nervous and upset, or how did he appear?
A. Normal.
Q. Normal?
A. Yes, sir; normal as—he wasn't upset or nervous. He just—as though he had been involved in this and he was glad to get it off his chest; but other than that, no different.
Q. Well, you made the statement in chambers there that he appeared just like he appeared there in chambers.
A. I said he appeared—he appeared in chambers, yes, sir.
Q. And that is an accurate statement of his appearance and his actions?
A. Yes, sir.
Q. The way—he wasn't noticeably excited about it?
[fol. 174] A. No, sir.
Q. And these statements were made absolutely voluntarily; there was no coercion of any kind?
A. No.
Q. What did you say to him with regard to making the statement?
A. I didn't ask him to make this statement. Mr. Collier asked him if he would make a statement.
Q. Didn't you say something to him?
A. When he was telling me about it, yes, I told him whatever he said could be used either for or against him, because I didn't know what he was going to say.
Q. It could be used either way?
A. Either way, yes sir.
Q. At this time when the statement was taken, had he been taken before a magistrate?
A. There were none available; he hadn't, no, sir.
Q. Did you take him before a magistrate before you took him down to the river during the day?
A. No, sir, I didn't.
Q. That was at 9:00 o'clock on Friday morning.
A. No, sir, I didn't.
Q. Did you take him before a magistrate before he signed the confession?

A. I didn't take him before a magistrate.

Q. As far as you know, was he taken before a magistrate?

A. I don't know; as far as I know, I can't say. I can't answer that.

Q. You were in charge of the detective bureau?

[fol. 175] A. Yes, sir; the complete overall operation.

Q. And as soon as a person is charged with a crime of this kind, no movement is made until the detective bureau clears it?

A. That is right; but I don't take care of the detail of every single case. I have 90 to 100 a day.

Q. This was the big case at that time?

A. One of the cases, yes, sir.

Q. This is what you consider a serious, big case?

A. Murder always is, yes, sir.

Q. And you paid attention to this case, did you?

A. To the general large picture, but not the fine details, no, sir.

Q. Could you state whether or not he had been taken before a magistrate before he signed it?

A. Not to my knowledge, no, sir.

Mr. Ryan: I understand there is a stipulation in the record that he was not taken before a magistrate before he signed it, and I want that stipulation to be understood at this time before the jury.

Mr. Collier: Whatever stipulation was made by the State was made for the purpose—on the question of the voluntariness of this confession, and that is the extent of that.

Mr. Ryan: I think that stipulation should be read to the jury at this time. It is an admission by the State and it is a part of the proceedings in chambers in regard to that and I think it is proper. I was the one——

The Court: State your understanding of that stipulation.

Mr. Ryan: My understanding was that he hadn't been taken before a magistrate before he made the confession [fol. 176] and he hadn't been taken before a magistrate at the time the confession was signed, approximately 24 hours later.

The Court: Substantially, as I recall it. I will accept counsel's statement as to what the stipulation was and so instruct the jury.

Mr. Ryan:

Q. Do you know when he was taken before a magistrate?

A. I don't know.

Q. At any time during your questioning of the defendant did you, or anybody in your presence, tell him that he didn't have to make a statement?

A. It will show in the statement; yes, sir.

Q. Well, did you?

A. He was told that in my presence, yes, sir.

Q. Did you tell him that he could have an attorney?

A. I didn't tell him. Mr. Collier was doing the questioning. It will show in the statement.

Q. Did you tell him?

A. I didn't.

Q. Did Mr. Collier?

A. I don't recall that he did.

Q. Did you tell him at any time that he had a right to be taken before a magistrate forthwith?

A. I don't recall that I did, no, sir.

Q. Is it the usual procedure to take a statement in the early morning hours after the defendant had been up like that?

Mr. Collier: Just a minute, your Honor: The usual procedure has nothing to do with this case whatsoever.

The Court: I am inclined to agree with you.

[fol. 177] Mr. Ryan: It seems to me, your Honor, it is pertinent as to the voluntariness of this statement.

The Court: Go ahead; I will overrule the objection.

Mr. Collier: Just a minute: I want to be heard on that,—any more than if he was trying to prove the speed of an automobile in an automobile accident. You can't bring witnesses to say "Usually this fellow drives at a certain speed"——

The Court: I appreciate that. You may inquire.

Mr. Ryan:

Q. Is it the usual procedure to take a confession at this early morning hour after he had been up this length of time?

A. The taking of the statement was a continuing process. He had told us all this during the first few hours of his

arrest. It was approximately five hours after he was arrested that this statement was taken. During that five hours he had taken the officers to the point where the girl had been murdered and told them——

Q. That isn't responsive.

Mr. Collier: Well,——

The Court: Proceed, officer.

The Witness: A. (continuing) He had taken the officers to the point where the girl had been murdered and told them where they had—where he had disposed of the weapons.

Mr. Ryan: If the court please, I object to that as hearsay.

The Court: Yes; as to what he told the officers.

The Witness: He told me these things when he returned prior to the taking of the statement.

The Court: You may proceed.

[fol. 178] The Witness: A. (continuing) And he told me that he had picked up this bar and that he had killed her. Do you want me to go into what he told me?

Mr. Ryan: If the court please, that isn't responsive to my question.

The Court: No; the question was, did this conform to the practice of the department with reference to taking a statement.

The Witness: It was the correct procedure, sir. It was a continuing operation.

Mr. Ryan: If the court please, I ask that all this statement made by the witness with regard to what he told him, and this, be stricken from the record as not responsive to the question.

The Court: I will deny the motion. They were explanatory of his answer, which was not entirely responsive to the question. Read the question, Mr. Reporter.

The Reporter: (Reading) "Q. Is it the usual procedure to take a confession at this early morning hour after he had been up this length of time?"

The Witness: A. It would be the usual procedure, yes, in similar circumstances.

Mr. Ryan:

Q. Is it the usual practice to take a prisoner before a magistrate as soon as one is available?

A. Usually, yes, sir.

Q. Why didn't you do it in this case?

A. The investigation hadn't been completed and we were not prepared to present our case.

Q. He was under arrest?

A. Yes.

[fol. 179] Q. And there was a magistrate available all during the day?

A. Yes.

Q. You didn't bring him before a magistrate, did you?

A. We were out trying to recover the murder weapons at the suggestion that we go out and get them.

Q. You didn't bring him before a magistrate that day did you?

A. We were looking for the weapons; no, sir.

Mr. Ryan: On that ground I move all this evidence be stricken, your Honor.

The Court: I will deny the motion.

Mr. Ryan: At the same time I move that the evidence be stricken on the ground that we made a request for the confession before the trial; that the confession was made—and the express statement of Captain Browne that he could use it for or against him, and it was not made available to us before the trial.

The Court: I will deny the motion.

Mr. Ryan: And on the other grounds I made in chambers.

The Court: Yes. Motion denied. Ladies and Gentlemen of the Jury: No prejudice must develop in your minds against defense counsel because he arises occasionally to make objections. That is not only their privilege, but their duty, to do so. All right. Next question.

Mr. Ryan: That is all, your Honor.

Mr. Collier: I think, your Honor, as long as the court has given the instruction that has been given, and which is proper, that the court might well follow that with the instruction that there is no legal duty on the part of any police officer to advise the defendant of any rights whatsoever.

[fol. 180] The Court: That will be a matter for consideration in connection with final instructions to be given to the jury. Something of the kind may be considered by the court at the trial's conclusion. At this time I will not so instruct.

Mr. Ryan: I want the record to show I don't agree with that statement.

The Court: All right. Next question.

Redirect examination.

By Mr. Collier:

Q. Now, Captain Browne, prior to the time the statement was taken—what is the number of that exhibit?

The Clerk: Fifteen.

Mr. Collier:

Q. I refer to Exhibit 15: You may state whether or not he was given breakfast.

A. He was.

Q. Now,——

A. We sent out and bought breakfast for him at the restaurant.

Q. Did you—oh, yes: Counsel asked you whether or not he was under arrest at that time. Now, for what charge was he under arrest?

Mr. Ryan: If the court please, I didn't ask that question in my examination.

The Court: The court recalls that specific question was addressed to Captain Browne and he testified he was under arrest at that time. The District Attorney has a right to inquire.

Mr. Ryan: I believe that was in chambers.

The Court: No; that was out here. You may inquire.

The Witness:

A. Yes; larceny of an automobile.

Mr. Ryan: If the court please, I don't think that is any [fols. 181-195] issue in this case.

The Court: It was brought out on cross examination of the witness. It is proper redirect. I again instruct the

jury that he is not being tried for larceny of an automobile. All right.

Mr. Collier: Which is part of the circumstances.

The Court: Next question.

Mr. Collier:

Q. Now, when you stated to him that the confession could be used either for or against him, what did you mean by that?

A. I would have no knowledge, when I was talking to him and asking him if he wanted to make a statement, and saying it could be used for or against him, whatever he said, I would have no knowledge of what he was going to say or would say. There may be statements that would be in his behalf to show some particular circumstance, or it could be against him on some other ground.

Q. At what time did you mean? Before or during the trial?

A. Oh, at the trial, sir.

Mr. Collier: That is all.

Mr. Ryan: That is all.

The Court: That is all.

[fol. 196] Robert C. McKeown, called as a witness on behalf of the State of Oregon, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Carskadon:

Q. Will you state your name to the jury, please?

A. Robert C. McKeown.

Q. And what is your occupation?

A. Detective, working in the homicide detail in the Portland police department.

Q. How long have you been connected with the Portland police department?

A. About seven years.

Q. How long in the detective division?

A. About three years.

Q. Will you state whether or not on August 11, 1949, you were so employed?

A. Yes, I was.

Q. What hours did you work that day?

A. I go to work at 4:15, until 12:15 in the afternoon.

Q. Four-fifteen in the afternoon to 12:15 A.M.?

A. That is right.

Q. And you were so employed on August 11th?

A. Yes, sir.

Q. On that day, officer, did you have occasion at any time on your shift to talk with Morris Leland?

A. Yes, I did.

Q. Do you see Morris Leland in the court room at this time?

A. Yes; he is sitting right over there (indicating).

[fol. 197] Mr. Carskadon: For the purpose of the record, your Honor, I would like to have it shown that the witness has indicated to—by a nod of his head—that he sitting behind counsel——

Q. Is that Morris Leland sitting in back of Tom Ryan?

A. Yes; that is him right there.

Q. What time did you talk, or did you talk to Morris Leland that day?

A. Yes.

Q. About what time did you talk to him?

A. Shortly after we went to work; probably, I would say, about 4:30.

Q. And can you explain what the occasion was of talking to him?

A. Well, it is customary in the detective bureau—we work by reliefs, and when the day relief has already talked to a fellow in a case, when we come on, while they are writing up their reports, and after we read their reports, we carry on what they have been doing, and it is customary in a case of this kind that we go to work, then we bring the man down and talk to him and carry on with the case.

Q. You were carrying on the investigation of the case?

A. Yes, sir.

Q. Now, on that date would you state whether or not Morris Leland requested to make a written statement?

A. Yes, he did, when we brought him down.

Mr. Ryan: If the court please, what date was this?

Mr. Carskadon: August 11th.
Mr. Ryan: What time?
Mr. Carskadon: Around 10:00 P. M., I believe.
[fol. 198] The Witness: Shall I go ahead?
Mr. Carskadon: Yes.

The Witness:

A. Yes, he did. We brought him down to the office and talked to him, and he had quite a bit on his mind he wanted to get off his mind. And we talked to him and asked him how he could express himself the best; whether he wanted us to take his statement and sign it, or if he could talk to us better, or whether he could write it out and express himself better. At the time he said that he felt he could express himself in his own writing. We gave him paper and pencil——

Mr. Ryan: At this time I want a hearing in chambers on this matter, if the court please. That is another statement I didn't know about.

The Court: Recess to 2:00 o'clock. If you will remain seated until the jurors have entered the jury room, if you please.

(A document was marked by the Clerk State's Exhibit 18 for Identification.)

Mr. Ryan: If the court please, at this time I might advise the court that I have, I am going to have a doctor present that may possibly take the stand; I doubt it, but he is to advise me as to this question of insanity; and I talked to Mr. Collier and he says it is all right with him if he is present in court during the questioning this afternoon.

The Court: Oh, I think so; yes, indeed.

Mr. Ryan: And I have extended the same——

The Court: Yes; entirely proper.

(The following proceedings were had out of the presence and hearing of the jury.)

[fol. 199] The Court: Read the question, Mr. Reporter, or the answer as far as it went.

(The answer was read.)

Mr. Ryan: I am objecting on the ground that it was not freely and voluntarily made and before a magistrate. And there is one point that may come out that didn't come out in the other—if I may have just a word with my associate——

The Court: Certainly.

(A discussion was had off the record.)

Mr. Carskadon:

Q. Officer, on that date did Morris Leland make a written statement of this affair?

A. Yes, he did.

Q. Will you tell the court under what circumstances and conditions were existing at that time prior to the scrivening of the statement?

A. We brought him down and talked to him and he apparently had something on his mind that he wished to get off. We talked to him. He said he wanted to make these statements, and I asked him if he could express himself through words better, or if we gave him paper and pencil if he could express himself by writing better. And he said he thought he could write out the details, better than he could tell us, in his own words. So we gave him the paper and the pen and let him sit across from us and he wrote out the statement and we verified or witnessed it.

Q. Where was he at the time of the writing?

A. He was in our office in the detective bureau, in the homicide office.

Q. Who was present?

A. My partner I was with that night was Alex Johnston, [fol. 200] and myself and Mr. Morris.

Q. Morris Leland?

A. Morris Leland.

Q. Had you ever seen, to know, Morris Leland prior to your coming on duty that night?

A. Well, I believe that I——

Mr. Ryan. I object to that question, as it has no bearing on the case and I think it is asked in order to connect Morris Leland with the previous crime.

Mr. Carskadon: Wait until——

The Court: Had he ever seen him before that night. I

don't see that that serves any purpose at this time. I will sustain the objection to the question.

Mr. Carskadon: All right——

Q. I am going to hand you State's Exhibit 18 for Identification and ask you what that is?

A. This is the statement that Morris Leland wrote in his own handwriting the night of August 11th in our office, and it is witnessed by my signature and the signature of my partner Alex Johnston.

Q. Can you say whether or not there were any promises made by you of leniency if he would so write the statement?

A. No promises; none whatsoever. He wished to make the statement himself. He wished to put it in his own writing.

The Court: Read that answer, Mr. Reporter.

(The answer was read.)

Mr. Carskadon:

Q. In other words, officer, it was granting the defendant's wish as a result of this statement?

[fol. 201] A. Yes. He said he could express himself better in his own handwriting; so we let him write it out.

Q. Was anyone else present at the time this was written?

A. No; just my partner and myself. There was other people coming in and out of the room, but nobody was there all the time.

Q. Who was your partner?

A. Alex Johnston.

Q. Were any promises made by him?

A. No; no promises whatsoever by either one of us.

Q. This statement starts off as follows: "I Morris Leland make this written without any threats or promises of any kind." Is that his language?

A. He asked us how we should start, he should start a statement. I said that it is customary that on all statements that he put it in there that there was no promises made him, or no threats; that he was to put that in the statement, and anything in that statement in his own writing is up to himself; we didn't put words in his mouth or on the paper.

Q. Did you issue any threats against him?
A. No, no, we didn't threaten him at all.
Q. This was entirely voluntary on his part?
A. Yes. He wanted to get it off his mind.
Q. Without any coercion upon your part or your partner's part in any way?
A. That is right. He wanted to do it.
Q. Did you advise him, or did anyone advise him in your presence, that if he made a statement in writing, that that might be used against him?
[fol. 202] A. Yes. We told him that if he made a statement that it would be used against him, and he said he wanted to get it off his mind, he wanted to write.
Q. And after being so advised, this is the result of his writing?
A. Yes, sir.

Mr. Carskadon: That is all.

Mr. Ryan:

Q. When was this statement taken, officer?
A. The 11th of October, in the evening,—August.
Q. Early evening?
A. About 10:00 o'clock, I believe.
Q. I note the time is 10:00 P. M. Well, now, did you call for the defendant to come down?
A. We went up and got him.
Q. Did you strike the defendant?
A. No.
Q. Are you sure of that?
A. Certainly.
Q. Are you sure you didn't hit him in the stomach and tell him he had to make a statement?
A. No, I never touched him.
Q. Had he been before a magistrate when this paper was made?
A. No. I believe that they brought him in in the morning some time and that—I don't believe he had. As far as I know, he hadn't.
Q. Did you know when he was arrested?
A. Earlier that morning.
Q. That would be August 11th. At what time?

A. I really don't know his time of arrest. The day crew, [fol. 203] or the second night crew brought him in prior to us—we hadn't talked to him before. That was the first time we had talked to him.

Q. You hadn't talked to him. Did you tell him that he could make a statement that he might use himself?

A. I don't understand that.

Mr. Carskadon: I object to that, your Honor. That has nothing to do with the voluntary issuance of this statement.

The Court: You may inquire. I will overrule the objection. Do you understand the question.

The Witness: No, I don't understand.

Mr. Ryan:

Q. Did you tell him that this statement might be used against him, or he could use it in his favor?

A. I said that it could be used against him.

Q. Did you say anything about using it in his favor?

A. No.

Q. Did you say anything about that he had a right to have an attorney?

A. I don't believe the question came up.

Q. You didn't mention it to him?

A. I don't remember; if I did I would have told him every man has a right to an attorney.

Q. Did you tell him, as far as you know?

A. I don't remember the question coming up.

Q. You didn't advise him he didn't have to make a statement either?

A. I told him if he made a statement—he wanted to get it off his mind—I said—well, he said it was of his own free will. I asked him how he could express himself. He thought he could express himself better in writing than any other [fol. 204] way, rather than tell us. So we took this statement. He wrote it out and we read it over and asked him if that is the way it was, and he said yes. And he signed it and we signed it, and then we read it and questioned him about the facts in that.

Q. But you didn't tell him that he didn't have to make one, in so many words?

A. He is the one that said he wanted to make a statement. We didn't say he had to or didn't have to. He was the one that wished to make it.

Mr. Pelay: May I ask a question or two?
Mr. Ryan: Well, just a minute.

(A discussion was had off the record.)

Mr. Ryan:

Q. Were you assigned to the investigation of this case?
A. Yes. I work homicide.
Q. And you are certain that you didn't strike him or anything like that?
A. Oh, no, no. I didn't touch the man.
Q. You sent for him to have him brought down?
A. We brought him down. We went up to the jail and brought him down ourselves.
Q. You went up to talk to him about this matter?
A. Well, it is customary—one detective team carries on. When you come to work, they say "There's a man in jail." You carry on the case and the first thing you do is talk to the man and see what the story is. Then you read the day crew's reports and see what they heard, and then you know if there is any angles for you to work on. If there is some-[fol. 205] thing left undone, you work on it.
Mr. Ryan: That is all.

Mr. Carskadon:

Q. When you read the previous crew's reports was there anything in there to indicate to you that any previous statements had been made?
A. No. I didn't know that they had taken a statement from the defendant. In fact, that is why we had the statement; there was no evidence of it at the time, and it is a customary thing if a man wishes to make a statement, to take a statement from him.

Mr. Collier: Ray, ask him, when he says that he didn't know of any other statements——

Q. You are referring to the statement in writing?
A. Oh, yes; I thought that is what he meant too. I know

he had been talked to but I didn't know that a written statement had been made.

Mr. Ryan: As I understand it, that this statement was made before the other statement was taken?

Mr. Collier: No.

Mr. Ryan: Afterwards.

Mr. Carskadon: Ten P. M., August 11th. Now, I have one more question:

Q. Is that (indicating) your signature?

A. Yes, that is my signature.

Q. And that (indicating) is the signature of Morris Leland?

A. That is what he wrote there, yes.

Q. And the time——

A. Everything is in his own handwriting.

Q. That time and date was correct?

[fol. 206] A. Yes, that is right.

The Court: What are you asking me to do?

Mr. Ryan: I am asking the thing be excluded. It was taken after a whole day had elapsed, during which time he was in custody and had a chance to go before a magistrate, and I don't think—they could keep him there for a month, keep taking statements—and I feel that under the circumstances it should be excluded.

The Court: Just a minute. Let me read the statement,—(reading statement).

Mr. Carskadon:

Q. "To Record Bureau, L-86907," was that on there at the time he wrote that?

A. No. That was put on afterwards, to attach it to the record bureau copy of the report.

Q. That is the report number in that case?

A. That is the report number in that case.

The Court: I will overrule the objection, if offered. Is this all you had, gentlemen, at this time?

Mr. Collier: Yes.

(Thereupon a recess was taken until 2:00 o'clock P. M. of this date, November 3, 1949, at which time proceedings

were resumed, out of the presence and hearing of the jury, as follows:)

[fol. 207] November 3, 1949.

(Pursuant to recess, proceedings were resumed out of the presence and hearing of the jury, as follows:)

W. N. Rydalch, called by the State of Oregon, without being sworn, was examined as follows:

Mr. Collier:

Q. Your name is W. N. Rydalch?
A. Yes.
Q. Your capacity is what?
A. Chief attorney at the Veterans Administration Regional Office, Portland, Oregon.
Q. And as such, what records do you have custody of?
A. Custody of the claims file of Morris Leland of the United States Veterans Administration, Portland, Oregon.
Q. And that file embraces what?
A. The records that he had while in the army and his claim for compensation subsequent thereto.

(Thereupon occurred a discussion off the record.)

The Court: Here is the stipulation, as I understand it:

Stipulated between the State and the defense that Exhibit No. 19 for Identification has been produced by W. N. Rydalch, Chief Attorney for the Veterans Regional Office; that such records are kept in the regular course of the administration of the affairs of the veteran named, to-wit, Morris Leland, and that they constitute a full and complete record of the named veteran. The District Attorney by such stipulation does not admit the accuracy or truth of any [fol. 208] statement in said record nor its admissibility in whole or in part. Is that right, gentlemen?

Mr. Collier: That is right.

Mr. Ryan: That is my understanding.

W. N. Rydalch excused.

[fol. 209] MRS. JEAN ORR, called by the State of Oregon, without being sworn, was examined as follows:

The Court:

Q. What is your official connection?

A. Good Samaritan Hospital. I am medical record librarian.

Q. And you have in your hand there the record of the hospitalization of Morris Leland?

A. Yes, I have.

Q. Is that a full and complete record?

A. Well, this is a reproduction from a microfilm record and it is here with the exception of the nurse's records. We didn't microfilm the nurse's records.

Q. It contains everything but the nurse's record?

A. Yes.

Q. And these records are kept by the hospital under your supervision, are they?

A. Yes, they are.

Q. And in connection with the hospitalization and treatment of the individual named, is that right?

A. That is right.

The Court: It is stipulated that further identification of this record is unnecesary and that the record itself, which would be marked Exhibit 20 for Identification, is sufficiently identified at this time without further testimony. The District Attorney's office, however, does not admit the competency of the exhibit, in whole or in part, nor the truth or accuracy of any statement therein made.

Mr. Collier: That is right.

Mr. Ryan: And that these were taken in the regular [fol. 210] course of business in the hospital.

The Court: Yes.

Mr. Collier: This is not a complete and whole record and does not contain the nurse's records of the individual patient.

Mr. Ryan: Are those available?

The Court: That appears in the statement.

The Witness: No; they were destroyed at the time the microfilm was done, about four years ago.

Mr. Ryan: This contains all the available records?

The Witness: Yes. Incidentally, there are no X-rays. There are X-ray reports but no X-ray films, because they also were destroyed.

Mrs. Jean Orr excused.

(Thereupon the following proceedings were had in the presence and hearing of the jury:)

[fol. 211] Robert C. McKeown, a witness on behalf of the State of Oregon, resumed the witness stand and, having been previously sworn, further testified as follows:

Direct examination

By Mr. Carskadon (Continued):

The Court: Will you read the last question, Mr. Reporter?

The Reporter: (Reading)—

> Q. Now, on that date would you state whether or not Morris Leland requested to make a written statement?
>
> A. Yes, he did, when we brought him down * * * Yes, he did. We brought him down to the office and talked to him, and he had quite a bit on his mind he wanted to get off his mind. And we talked to him and asked him how he could express himself the best; whether he wanted us to take his statement and sign it, or if he could talk to us better, or whether he could write it out and express himself better. At the time he said that he felt he could express himself in his own writing. We gave him paper and pencil——

Mr. Carskadon:

Q. After you gave him the paper and pencil, officer, did he make a statement, a written statement?

A. Yes, he did. He wrote out a statement.

Q. Before any statement was made by him, any writing was made by him, was there any other conversation between you and the defendant?

A. Yes. We told him that this statement could be used against him, and he said that he wanted to get it off his [fol. 212] mind and he wished to make this written statement. So we gave him the paper and pencil and he sat across from us at the other desk and wrote out this statement.

Q. By pencil and paper, do you mean pen?

A. Yes. It was my pen.

Q. Whose pen was it?

A. Mine.

Q. I would like to hand you, Officer, State's Exhibit 18 for Identification and ask you if you know what that is?

A. Yes. This is the statement made by Morris Leland in our office and it was witnessed by myself and my partner.

Q. And what time was that statement made by Morris Leland?

A. Ten P. M. the night of August 11th.

Q. I notice that statement—is that in the same condition as it was the night, the night that he signed it?

A. Well, it is, with the exception of the case number put on here to identify it with the case, to connect it with the rest of the case, and the words on here "To Record Bureau," which automatically sends this to the Record Bureau to connect it with the case. And up here in the left-hand corner there is a number, Judge Crawford's court trying it up here, I believe.

Q. There is a number and "State's Exhibit 18, Crawford, Judge; C. P. Irvine, Clerk,"——

A. Yes.

Q. —and "To Record Bureau L-86907," wasn't on this statement at that time?

A. That is right.

Q. Otherwise, it is the same statement as he signed?

[fol. 213] A. Yes.

Q. And whose signature is this (indicating)?

A. That is my signature.

Q. And what does that say?

A. Robert C. McKeown.

Q. And below that?

A. Alex J. Johnston, who was my partner that evening.

Q. Now, was any promise of leniency made to this defendant if he would make a statement?

A. No. He brought up the matter himself that he wished to write this statement; he wanted to get it off his mind.

Q. It was at the defendant's suggestion, that is the result of this statement, is that right?

A. Yes. He said he wished to get the matter off his mind and make a statement, and we asked him how he could express himself the best and he said in writing it himself.

Q. And it was voluntary?

A. Yes.

Q. Now, officer, will you explain to the jury and the court why you took a statement from him at 10:00 P. M. that evening?

A. Well, my partner and I go to work on the first night relief at 4:15 in the afternoon until 12:15 the following morning, and it is customary in all cases that when one team is assigned to a detail, such as homicide, when they are through with their shift they write a report of what they have done on the shift. When we come on, we try to read their reports and deduct from their reports what there is yet to do on the case. In a case of this kind, naturally our [fol. 214] first thing to do is to talk to the man and get his idea and have him talk to us himself so we could see what there was to do on it.

Q. In other words, you were still investigating this case?

A. That is right, yes, sir.

Q. And in reading the reports of the other officers, after you came on, was it your impression that any written statement had been taken from him before?

Mr. Ryan: I object to that,——

The Court: As to his impression, I will sustain the objection.

Mr. Carskadon:

Q. Was there anything in the reports that you read that indicated a written statement was taken?

Mr. Ryan: I object to that. That is a leading question and elicits the answer.

The Court: Was there anything in the reports that he

read that indicated a written statement had been made? You may answer.

Mr. Ryan: I object to it on the further ground that, if anything, it is rebuttal and not for direct examination.

The Court: That is possible; but the order of proof is largely, or to some extent, discretionary with the court. You may answer.

The Witness:

A. No. The report we read stated that they had talked to him orally but it didn't definitely mention that a statement had been taken as far as I know. In these cases it is the usual procedure to get a statement from the prisoner; either have them—you take your statement down and have them sign it, or they make a statement themselves. In this case he said he could express himself better by doing it himself, which he did.

Mr. Carskadon: At this time, your Honor, we will offer [fol. 215] State's Exhibit 18 for Identification in evidence.

The Court: The court has in mind the objections heretofore made to the statement. It is not necessary to restate those objections unless counsel desires.

Mr. Ryan: The only thing is—it is in the record. There is no use repeating.

The Court: If you wish, you may do so.

Mr. Ryan: I would like to, your Honor: I object to this on the ground that this statement was taken after the defendant had been in custody for almost 20 hours, during which time the court had been in session all day. He was not taken before a magistrate; he was not advised of his constitutional right against self-incrimination nor of his right to have counsel, and that therefore the statement was taken in an unconstitutional manner and is void.

The Court: Identification Exhibit 18 is received over objection.

(The document referred to was marked by the Clerk State's Exhibit 18.)

Mr. Carskadon: If your Honor please, at this time the State would like to reserve the reading of this confession

and stipulate with counsel that either side may read it at any time during the trial or in final argument.

Mr. Ryan: Well, let's read it now. I think it would be just as well if we are going to do it.

The Court: Read it now?

Mr. Ryan: I think that should be done.

The Court: Yes.

[fol. 216] Mr. Collier: I would like to read another statement first, your Honor, immediately before it.

The Court: Well, now, gentlemen, in order to avoid confusion, as you know, one attorney starting the examination of a witness should conclude that examination, and two attorneys on one side should not alternate in the examination of a witness.

Mr. Collier: I am not attempting to do that.

The Court: Well, you are stepping into the case now and asking something with reference to the reading of some other statement while the witness is being examined by your co-counsel. I will ask you to be seated, Mr. Collier.

Mr. Collier: Sure.

Mr. Carskadon: At this time I ask permission of the court to read the statement of Morris Leland which was taken by Katherine Marlowe, the first statement given by the defendant in this case. That is why at this time, your Honor, I requested the stipulation with counsel to read the second statement in its due order. However, if counsel insists, at this time I wish to ask leave to read both statements.

The Court: You are referring to Exhibit 15?

Mr. Carskadon: No. 15 and 18, your Honor.

The Court: No. 15 you wish to read first?

Mr. Carskadon: That is correct.

Mr. Ryan: No objection. The only thing I have in mind by refusing to stipulate to read those at any time they want, if this is going to be read some time in the argument, I don't think it is proper—I think it should be read before the close of the State's case.

The Court: You are going to read both right now. Read [fol. 217] 15 first.

(State's Exhibit 15 was read to the jury.)

The Court: We will take a ten minute recess. Will you remain seated until the jury has entered the jury room, please.

(A short recess was taken, after which proceedings were resumed, as follows:)

Mr. Carskadon: If your Honor please, at this time I would like to read Exhibit 18——

The Court: Yes.

Mr. Carskadon: ——to the jury. For the purpose of the record, Exhibit 18 is the confession of Morris Leland made in his own handwriting before Robert C. McKeown, who has just identified it.

(State's Exhibit 18 was read to the jury.)

Q. Now, officer, after taking that statement, after Leland had finished that statement, did you elaborate—strike that—did he elaborate on that statement any?

A. Yes. We read the statement back to him and asked him if that was the way it happened and he said yes and signed his name. And then as we read it over, piece by piece, then we would ask him questions pertaining to that statement and he would elaborate on the questions that we asked him. Do you want me to go ahead with what he elaborated on?

Q. Yes.

A. In the statement he mentioned when he first met her that she saw the knife and we asked him how she saw the knife. He said when he came up upon her he pulled his coat back and put his hand on the handle of the knife, which was stuck in his belt, and then asked her "Where you going?" [fol. 218] and "Come with me," or whatever the statement said there. After he got there he was talking about the act of raping her. We asked him——

Mr. Ryan: If the court please, I move to strike that. There is no evidence of any rape in here.

The Court: What is that?

Mr. Ryan: I move to strike that. There is no evidence of any rape in here.

Mr. Carskadon: Well, I understand he was referring to that statement in which—which I read—where he said he attempted to rape her.

The Court: Just what was said in that regard, officer?

The Witness: I mean that in his words there, that is what he used. He said that was what he was trying to do to her,—

The Court: Go ahead.

The Witness: —in his own words. We asked him——

The Court: There is no evidence of rape, I take it.

Mr. Collier: That is right, your Honor.

The Witness:

A. (Continuing) We asked why he had stopped this intercourse and he said that he didn't know at the time that she was as young as she was and that it hurt her so much that he didn't want to have anything to do with her. So then we asked him about that night, about them going to bed. He said he took this knife out of its scabbard and stuck it in the ground next to his head, and that they went to sleep, and when he woke up in the morning she had moved, slid away about 20 feet from him and it looked like she might be going away. And he said he reached out and grabbed hold of the knife and said "Come back here," which she did. I think [fol. 219] that is about all the elaboration, that is about all I think I did.

Mr. Carskadon: That is all. You may cross examine.

Cross-examination.

By Mr. Ryan:

Q. Officer, will you stand up, please?
A. (Witness complies).
Q. How tall are you?
A. Six foot six.
Q. How much do you weigh?
A. About 315 pounds.
Q. Take the stand again.
A. (Witness complies).
Q. As I understand it, you took this statement of the defendant as a matter of routine?
A. That is right.
Q. And you called him, you went up to the jail to get

the defendant and brought him down to the detective headquarters and took this statement from him?

A. Yes.

Q. That statement was taken absolutely voluntarily on his part?

A. Yes. He wished to get it off his mind.

Q. He wished to get it off his mind?

A. Yes.

Q. And he made it quite emphatic that he wanted to get it off his mind?

A. He acted as if he had something on his mind and he wished to tell us about it. I asked him how he could best express himself and he said by writing.

[fol. 220] Q. And as I understand it, this statement was taken at 10:30 Friday night, that was the 11th?

A. Yes; the date and time is on the statement.

Q. Yes. I just wanted to get that straightened in my mind. He had been in custody all that day?

A. Yes.

Q. And he had been in custody most of the previous night, or part of it?

A. I don't know. When I came to work at 4:15, he was in jail then.

Q. Did he tell you he had made two previous statements?

A. No.

Q. Did he tell you he told these other officers the story?

A. He said he had talked to them, yes.

Q. And still made quite a bit of emphasis of wanting to get the matter off his mind?

A. Something was bothering him.

Q. Did he say that?

A. Yes.

Q. You didn't strike him, or anything?

A. No.

Q. Are you sure of that?

A. No, I didn't strike him.

Q. Is this his language entirely?

A. Anything that is in that statement he wrote of his own free hand. We didn't tell him to write anything.

Q. Is it his language, his words?

A. Yes.

Q. You didn't dictate any part of it to him?

[fol. 221] A. No. The only thing we told him that—we told him as long as he was making it of his own will, that he should put it in there that we had made no promises and no threats to him.

Q. Officer Johnston was there with you?

A. That is right.

Q. You both were present and you both signed this as witnesses?

A. Yes, sir.

Q. Had he been taken before a magistrate that day?

A. That I don't know, sir. I came to work at 4:15 and he was upstairs in jail when we got to work, and I don't know.

Q. Well, how did you happen to go up and get him?

A. Well, it is procedure, as I told you before one time. I work homicide. That is my detail. In case of a homicide, where there is one, when the day crew have done their part they write their report and it is up to us to follow on. And in this case, naturally, the first thing we wanted to do was talk to the man and see and get his side of it.

Q. Did you read the report of what the day crew did?

A. Yes. We read part of their report; part of it wasn't complete yet.

Q. You work under Captain Browne?

A. Yes.

Q. Did you have any conversation with him about this case?

A. No, sir. He is usually there during the day, and as I remember it—we have our own officers on our own relief that give us our assignments and our orders, Lt. Crisp and Sergeant Warren, and when they give us the case we work on it. I had no conversation with Captain Browne regarding it whatsoever.

[fol. 222] Q. Well, you are certain that you didn't know there was another confession in the record?

A. No. I didn't know that he had made a statement previous.

Q. Well, doesn't it seem funny to you—did he appear that he hadn't told anybody about this when you talked to him?

A. No. In his own words, he stated he had told them about it; that he had told them before all about it.

Q. Did you ask him if he had made a statement?

A. I don't remember whether I did or not.

Q. Well, you would remember if you asked him if he made a statement.

A. Not necessarily. I asked him if he had stated the facts before. He said yes, he had.

Q. How many statements do you take from a man down there before you take him before a magistrate.

Mr. Carskadon: Objected to; argumentative.

The Court: I think it is argumentative. You may inquire as to what he did or didn't do in this case.

Mr. Ryan:

Q. How many statements do you generally take down there?

Mr. Carskadon: I object to that.

The Court: You may answer.

The Witness:

A. We usually take one.

Mr. Ryan:

Q. You generally take that before or after you take him before a magistrate?

A. Well, we usually take it as soon as we can, while the incident is fresh in his mind.

Q. And before he is advised of his rights?

Mr. Carskadon: I object to that.

[fols. 223-249] Mr. Ryan: That is all.

Mr. Carskadon: Counsel knows better than to frame a question like that.

The Court: I will sustain the objection to the question. Is there any redirect examination of the officer?

Mr. Carskadon: That is all.

The Court: That is all.

Mr. Ryan: One more question:

Q. Do you usually take this type of statement?

Mr. Carskadon: We object to what he usually takes.

The Court: You may answer.

The Witness:

A. As I told you before, several times, I asked the man how he could best express himself. I did it for the man's own benefit; in that he could express himself in that way the best, in his own handwriting and in his own words and phrasing; and that he did.

Mr. Ryan:

Q. Don't you generally take a typewritten statement and have a reporter there?

A. Not necessarily. We can have a court recorder, which he had. We can make it a typewritten report and have him read it, and take it in our words and have him read it and sign it; but he said he could express himself best in his own writing; and that he did.

Mr. Ryan: That is all.
The Court: That is all, sir.

Witness excused.

[Vol. 250] MOTION FOR MISTRIAL

Mr. Ryan: If the court please, I would like to make a motion in chambers.

The Court: Ladies and Gentlemen of the Jury, we will take a ten minute recess, or so. We will call you in when we need you. You may retire to the jury room. Please remain seated until the jurors have entered the jury room.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Ryan: At this time, your Honor, we ask for a mistrial upon the ground and for the reason, first, that—we repeat the request for mistrial that we made in the early part of the trial with reference to the question of parole coming out before the jury; and the other grounds—I don't have them all—let the record show that we have repeated those at this time, or do you want me to go over them?

The Court: The court has in mind the grounds assigned by counsel in previous motions for mistrial. Now, let me think one minute——

Mr. Ryan: I can outline them if you would rather.

The Court: However, for the purpose of the record, I think it better to proceed: One, with reference to probation coming on before the jury, is in the court's mind. You may proceed from there on.

Mr. Ryan: And further on the ground that statements made by jurors at the time of the questioning on the voir dire were such as to elicit answers which prejudiced the minds of the other jurors, in that they stated that they were so prejudiced, and the crime was of such a nature, that they [fol. 251] couldn't form an honest opinion; I mean they couldn't—strike that—that they had already formed an opinion and they couldn't remove it from their mind; and in particular those two jurors who stated that they had daughters about this age, and it was called to the attention of the other jurors to what their opinion was by virtue of their statement.

On the further ground that this trial was forced to issue in a hurried manner and while this matter was alive in the public mind, as outlined in my written motion, my two written motions, filed before the trial. And at this time I renew, I mean I set them in here as ground for motion for mistrial.

The Court: I have read those motions.

Mr. Ryan: Yes, and you are acquainted with them.

On the further grounds that there have been in the trial here two confessions which were not taken after—they were not taken properly and in order, and the defendant hadn't been brought before a magistrate and hadn't been properly advised of his rights to counsel and against self incrimination.

And on the further ground that although it was testified by the State's witness that one of the inducements offered to the defendant in making the confession before mentioned, one of the confessions before mentioned, was that the defendant would be permitted to use that confession and the statements made therein in his case, and that although that statement was made, and although we filed a written motion for the right to use that confession before making our opening statement and preparing our case, that motion was denied in this court, and I move for a mistrial on that

[fol. 252] ground, that confession has been read into the record.

There is one further one; I move for mistrial on the further ground—and this ground I urge very sincerely, your Honor—that there is in evidence in this case several items of clothing, all of which were objectionable to us. I can't see where they have in any way tended to aid the case or even corroborate the statements of the State's witnesses, or the confessions, and they are in there solely for the purpose of arousing the prejudice of the jury. I call your Honor's attention particularly to this clothing, and a picture which showed the deceased at the morgue, naked, with very gruesome blows upon her face and wounds in her abdomen. I call your Honor's attention that the State urged the right to introduce that evidence before any preliminary hearing in chambers, because it was necessary for the doctor to describe the wounds; he couldn't describe them by oral testimony. I want the court to realize, and I think the court noticed, that the doctor, in describing these wounds used the picture only to show to the jury and then would point out on his own body very clearly where these wounds were, and I have particular reference to the wounds on the forehead and where he pointed to the wound on the side, describing it from the point on his body, to-wit, his nipple, and where it was, and these other two wounds. It is my contention that it was just as simple for him to describe these wounds briefly without reference to the picture, and if he needed something to demonstrate on he could have, as he did in this case, demonstrated on his own body. The only purpose that that picture served was, having been held before the jury for such a period of time, some of which time he was not [fols. 253-254] referring to the picture, was to inflame passion and prejudice, as is true of these other items. That is on my motion for mistrial.

[fol. 255] DONALD W. McEWEN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. Mr. McEwen, will you speak up so that the ladies on the end of the jury there can hear you?

A. Yes, sir.

Q. What is your name, please?

A. Donald W. McEwen.

Q. What is your occupation?

A. I am an auditor of the State Inheritance Tax.

Q. You are an attorney, are you?

A. Yes.

Q. Are you acquainted with Morris Leland?

A. I was in the past.

Q. How long ago was that?

A. Oh, perhaps ten or 15 years ago. At the time I was 12 or 13.

Q. Do you remember an automobile accident in which he was involved?

A. I do.

Q. Do you remember it clearly?

A. Yes, quite clearly.

Q. Would you tell the jury just exactly what you remember about the automobile accident?

A. At the time it was in the summer, perhaps in the middle of the day, I was playing with another lad about my age——

Q. How old were you at that time?

A. I believe I was 13,—and we were near St. Helens Road, between Saltzman's Road and 60th St., and we were [fol. 256] on the right edge of the road as the—as you go towards Portland. At that time the defendant was playing some distance from us and our attention was directed, and I can't recall what directed our attention, but we looked up and saw the defendant on the edge of the road, actually on the road, and at that very moment he was struck by an automobile which was, I couldn't say how fast it was going,

but he was struck and thrown through the air and he landed off the road and he appeared to land on his head in the yard in front of this building where he resided at that time. And that is actually all I saw in regard to the accident.

Q. What did he land on in the yard?

A. Well, there were—it is difficult to say. There were a number of rocks throughout the yard and he landed among those rocks.

Q. Did you observe him after he landed?

A. Yes. We went over there where he was lying, he was writhing.

Q. Was he unconscious?

A. Yes, he was.

Q. Did you notice if there was any injury to his face or head, or do you remember?

A. Considerable blood on his head.

Q. About how far was he thrown through the air?

A. Perhaps ten feet.

Q. Well, did he leave the ground completely?

A. He did.

Q. Will you describe to the jury what direction he went, whether it was straight across, or an arc, or whatever it was?

A. His body was thrown up in the air and he seemed to be traveling through the air with the long axis of his body [fol. 257] parallel to the ground, describing a slight curve.

Q. By that you mean he was thrown horizontal——

A. Yes.

Q. ——through the air? That is your recollection?

A. Yes.

Q. Do you recall how fast this automobile was going?

A. I don't.

Q. Do you recall where the automobile stopped with reference to the place of impact?

A. Yes. My recollection is that the automobile made a very good stop; that is, it stopped quite close to the point of impact.

Q. Were you a close friend of Morris Leland at that time?

A. No, I was not.

Q. Did you have any association with him of any extent afterwards?

A. No, I didn't.

Mr. Ryan: That is all.

Cross-examination.

By Mr. Collier:-

Q. Did he go to the same school you did?

A. No, sir; I don't believe that he ever went to any school that I did.

Q. You saw him after that?

A. Yes.

Q. And how long after, if you remember, approximately?

A. Well, it all transpired a long time ago. The only thing I can recall now, I remember when he came back from the hospital.

Q. You what?

A. I can remember the approximate time that he came back from the hospital. I saw him after he returned from the hospital.

[fol. 258] Q. Where did you see him?

A. In the neighborhood where we lived.

Q. And he was up and around playing after that?

A. Yes.

Q. He appeared to be the same as he did prior to that, I take it?

A. Well, it is a rather difficult question to answer. I should say, yes.

Mr. Collier: That is all. Thank you.

Redirect examination.

By Mr. Ryan:

Q. Why is it difficult to answer?

A. Well, I was ten years, or eleven or twelve, and I didn't associate with him particularly.

Q. Do you recall, could you say positively that he was the same as he was before? Could you swear at this time, afterwards that he was the same as he was before, from your own knowledge?

A. To my knowledge, at any rate appearances, he was.

The difficulty is, the only thing I remember yet, really, is that accident. That is the only thing that was impressed on my mind.

Q. That is all you can really remember?
A. That is true.
Q. You didn't associate with him very much?
A. No.

Mr. Ryan: That is all.

Recross-examination.

By Mr. Collier:

Q. How close did you live to him?
A. At that time I think I lived about a half a block from him.

Q. And that being true, you were out playing and he was out playing, is that right?
[fol. 259] A. I assume he was out playing——
Q. I mean prior to the accident.

Mr. Ryan: Let him answer.

Mr. Collier:

Q. Prior to the accident.
A. Prior to the accident?

Q. You had seen him out playing almost daily, hadn't you?
A. I saw him occasionally.

Q. And you saw him just as much after the accident as before?
A. That is probably true.

Q. And from what you observed of him prior to the accident and what you observed of him after the accident, why, he appeared to be the same after as before?
A. Yes.

Mr. Collier: That is all.

Redirect examination.

By Mr. Ryan:

Q. How old were you then?
A. Thirteen.
Q. How old was he, do you recall?
A. He was pregrammar school age, I imagine four or five.
Q. You didn't play with him, did you?
A. No.
Q. Was he a close associate of yours?
A. No.
Q. Is there anything definite that you remember, in your mind, any incident definite in your mind, beside this accident?

Mr. Collier: Your Honor, this is getting into cross examination of his own witness. I object to it.

The Court: I am inclined to think so; however, you may [fol. 260] answer.

The Witness: Will you read the question?

Mr. Ryan:

Q. Is there anything, do you know, in your mind, that you remember, besides this accident?
A. You mean a single isolated incident?
Q. Yes.
A. No.

Mr. Ryan: That is all.
Mr. Collier: That is all.

Witness excused.

[fol. 261] Clara Lolk, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. Mrs. Lolk, what is your name?
A. Clara Lolk.
Q. Where do you reside?

A. At Gearhart; Oregon.

Q. Are you any relation to the defendant, Morris Leland?

A. No.

Q. Now, Mrs. Lolk, this court room is rather large and a lot of people in it. Would you try to talk so that the two ladies on the end of the jury can hear everything you say?

A. I will do that.

Q. They are the important ones. Do you know the defendant, Morris Leland?

A. Well, as a child, yes.

Q. And about what period in his life would you say that you knew him?

A. I think he must have been about eight when I first knew him?

Q. How long did you know him?

A. Well, I should judge about four or five years.

Q. What was the nature of your acquaintanceship with him?

A. Well, he used to come down and just come into the yard and look at my son's toys and things.

Q. What did you observe about him?

A. Well, that he was unusually quiet and just never seemed to play like other children do. He was just, well, just quiet and just wasn't observing or wasn't interested in toys like other boys would come and play.

[fol. 262] Q. Did you talk to him at all?

A. Well, he hardly ever answered; he was just quiet.

Q. What do you mean by "quiet"?

A. Well, he just didn't seem to be, well, observing or interested.

Q. Well, was this—what kind of condition was this?

A. I didn't think it was normal. You could look at him and see that he wasn't really normal.

Mr. Collier: Just a minute, please: I don't think that is proper.

The Court: I will strike the last statement of the witness from the record, your conclusion that he was not normal, and the jury will disregard that portion of the testimony. And, Mrs. Lolk, you are permitted to testify as to what you observed, his demeanor as a boy as you saw him, his associates, whether he was quiet or talkative, his interest in

things or his lack of interest, and anything else so that the jury can draw the conclusion, you see, as to what his condition may have been.

The Witness: He never came alone. He always came with his older brother, and he was a very much neglected child. He hardly ever had any clothes.

Mr. Collier: If your Honor please, what has this to do with the state of mind, or the defendant's sanity or insanity, at the time that Thelma Taylor was killed? I object to it. If he didn't have clothes—some people have more, are financially fixed better than others and can put different clothing on their children than others.

The Court: She has answered the question. Next question.

Mr. Ryan:

Q. Well, this quietness, was it—why did it come to your [fol. 263] attention?

A. Well, he seemed to be such a pitiful boy; that is one reason why. He wasn't—well, I would say that he just wasn't just all there; that's the——

Q. That is the best way you can put it?

A. Yes.

Q. And you had several opportunities to observe him?

A. Yes.

Q. For how long a period?

A. Well, I don't know; for four or five years—even when he got on the bus, coming from school, he looked different from the other children.

Q. Did he act different?

A. Yes.

Q. Did you know about this automobile accident he had?

A. I knew about it and that is about all. I heard about the accident.

Q. Was this before or after that accident?

A. After.

Q. Did you attempt to have conversations with him when he came there?

A. Pardon?

Q. Did you attempt to have conversations with him when he came there?

A. Well, you know, he was just a boy, and of course the

boys—usually boys start to play; but he never just played like other boys.

Q. Did you ever talk to him?

A. Well, yes. Once I took him in because he had only half of one shoe and another shoe on the other, and I took him in and put a pair of shoes on him.

[fol. 264] The Court: You can't describe his clothing, his affluence, his poverty, or anything of that kind. You can state what you observed with reference to his mental and physical and mental activities. Next question.

Mr. Ryan:

Q. Well, what I was getting it, did you ever say "Hello" to him, or greet him, or anything of that sort?

A. Well, he hardly ever answered if I said "Hello." He never said "Goodbye."

Q. Did you form an opinion as to whether or not he was sane or insane?

A. Well, he was pretty young and I would say that he wasn't bright and didn't really know very much.

Mr. Ryan: That is all.

Cross-examination.

By Mr. Collier:

Q. You, of course, knew nothing of his conduct prior to the accident, did you?

A. No; only when—

Q. What did you say he came over to your house for?

A. Just came to look at my son's toys.

Q. So he did show an interest in the toys?

A. No, he didn't show an interest in the toys. He just came with his older brother.

Q. Well, that is the only purpose he came for, was to look at them, is that right?

A. Well, he just trailed along with his older brother. His brother would come, and Morris would just trail behind him.

Q. Now, you stated that he came to look at the toys.

A. With his older brother.

[fol. 265] Q. Answer me now, Mrs. Lolk. I don't mean to be sharp or short with you, but I do wish you would listen

to the question first before you try to answer it. Now, did he come for the purpose of looking at the toys, or didn't he?

A. Well, he just came with his older brother.

Q. Now, answer my question. Your statement was originally that he came to look at the toys. Now, did he or didn't he?

A. Well, he wasn't interested in the toys; he didn't look at them——

Q. Will you answer——

Mr. Ryan: Let her finish. She is attempting to explain.

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer and explain if you wish.

The Witness:

A. Well, you know, I had a son and he had boys—naturally, when boys come you think that they come to look at toys, but—he did come with his older brother and it was his brother that he trailed continually. That is all I can say about it.

Mr. Collier:

Q. Now, you have seen many children, haven't you, that didn't have the same interests of other children?

A. Well, yes; I have seen a lot of children.

Q. And found some children are more advanced for their years than others, haven't you?

A. That is true.

Q. And those children that were more advanced for their years didn't pay the same attention to the same things that those that weren't advanced, isn't that right? In other [fol. 266] words, they were older for their age. Can you answer the question?

A. Well, you certainly see children that are brighter than others, yes.

Q. And he went to school all the time, didn't he, as far as you know?

A. I don't know.

Q. You said you saw him on the school bus?

A. Well, yes.
Q. Saw him regularly, didn't you?

Mr. Ryan: On the school bus, you mean?
Mr. Collier: That is what she said.
The Witness: Not a school bus.
Mr. Ryan: She doesn't understand.
Mr. Collier: Let her ask if she doesn't understand.
The Court: Read the question, Mr. Reporter.

(The question was read.)

The Witness:

A. I didn't get on the bus every day; that wasn't a school bus; that was a bus running to Linnton, just picked up the children at the school.

Mr. Collier:

Q. And you saw him getting on and off the bus, didn't you?
A. If I happened to be on the 4:00 o'clock bus.
Q. You made the statement originally that you saw him on the bus. Isn't that right? Did you make that statement?
A. Yes; once in a while, if I happened to be on the bus.
Q. Now that I question you about it, you want to say that you saw him very little on the bus, is that right?
A. How often does a housewife take a bus to town? Not very often.

[fol. 267] The Court:

Q. You saw him very little on the bus, Mrs. Lolk?
A. Yes.

Mr. Collier:

Q. So what you saw of him on the bus didn't give much of any basis to form an opinion, did it?

Mr. Ryan: I think that question is argumentative and not proper.

The Court: She has expressed an opinion on direct examination. The District Attorney has a right to inquire. You may proceed.

The Witness:

A. He just looked dull, duller than any of the other children.

Mr. Collier: Will you read that last question, Mr. Reporter, prior to her answer now?

(The question was read.)

The Witness:

A. Yes; on the spur of the moment.

Q. And that is all it amounts to. Is that right?

A. When a child walks into a bus with maybe 20 other children, and you see maybe one child like that, you will always more or less pity that child, because he looks dull. That is the interest I had.

Q. Your main pity you had for him was the fact that he wasn't able to have as nice clothing——

A. No.

Q. —as some of the other children?

A. No; it was just the expression on his face.

Q. Why did you make mention at least twice on direct examination about his clothing?

A. Because I didn't think that he had even good care, [fol. 268] maybe because he was dull.

Q. And that, of course, was one of the things that you noticed, wasn't it?

A. What? That he was dull?

Q. No; that he didn't have the same clothing——

A. No, not particularly.

Q. Oh, you didn't? Why did you see fit to mention it twice when not even being asked about the matter, on your direct examination?

A. (No response).

Q. You volunteered twice during your direct examination statements concerning his clothing and dress. Why did you see fit to do that?

A. Well, perhaps because I was sorry for him because he was such a pitiful looking sight.

Q. And the "sight" was made up of his clothing——

A. No.

Q. —as well as everything?

A. If you had seen his pinched face you would feel sorry for him too.

Q. You are very definitely interested in the outcome of this case, aren't you?

A. No; I am as far as the life is concerned, yes.

Q. And it is your purpose to do whatever you can to save his life. Isn't that right?

A. Well——

Q. Well, is it or isn't it?

A. I would like to save a life.

Q. And that is,—you are definitely conscious of that now?

A. I don't see where this is proper.

[fol. 269] The Court: He has a right to inquire.

Mr. Collier: Read the question, Mr. Reporter.

(The question was read.)

The Court: That last question is a little difficult. Reframe it.

Mr. Collier:

Q. That is your present state of mind now, is it?

A. That I would help to save any life?

Q. That you are trying now to do that. Isn't that right?

A. I am trying to just do what I feel is right.

Q. Will you answer my question yes or no?

A. Yes; I would like to save his life.

Mr. Collier: That is all.

Redirect examination.

By Mr. Ryan:

Q. You may explain now.

The Court: If you wish to explain your answer, you may do so.

The Witness:

A. Well, I feel that the boy is not in his right—was not in his right mind even when he was little.

Mr. Collier: Do you want to explain any more——

The Court: Any further questions, Mr. District Attorney?

Mr. Collier: Yes. I said, Do you wish to explain further?

The Court: No. That is up to me. I allowed her to explain, which she did, and she quit, and what is the next question?

Mr. Collier: That is all.

Mr. Ryan:

Q. Are you a friend of the family?
A. No.
Q. You are here under subpoena?
A. Yes.
Q. Do you have any interest in the outcome of the case?
[fol. 270] A. No.
Q. Personally?
A. No.
Q. What you have said is true?
A. Yes.

Mr. Ryan: That is all.
Mr. Collier: That is all.
The Court: That is all.

Witness excused.

Mr. Ryan: If the court please, Mrs. Lolk wants to go back to Gearhart. She came down here, and unless you want to call her again——

Mr. Collier: No.

The Court? You are excused, then, Mrs. Lolk.

[fol. 271] Harold Leland, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your name, please?
A. Harold Leland.
Q. Will you talk up so the jury can hear you?

A. I will do the best I can, sir.
Q. What is your occupation, please?
A. I am a truck driver.
Q. With whom are you employed?
A. Asbury Transportation Company.
Q. How long have you worked there?
A. Seven years, sir.
Q. What relation are you to Morris Leland?
A. I am his father.
Q. Was he ever involved in an automobile accident?
A. Yes, sir.
Q. About when was that?
A. Nineteen thirty-three, sir, August.
Q. What injuries did he sustain in that accident?
A. Well, it never was made definitely clear what injuries he had received. He was hit by the car and then run over by the car, with the wheels, knocked in a complete manner off the highway 14 or 15 feet, and the driver lost control of his car and then run over the child as he lay prone on the ground, with either the front or back wheel. However, I didn't see the accident.
Q. Do you know what injuries he received?
[fol. 252] A. No, I don't know what injuries he received, because he was taken to the hospital and examined and there was no apparent injury disclosed, that is, the child was eventually released from the hospital with no apparent injury, nothing that could be detected with X-rays or any of that.
Q. Was he just taken to the hospital once?
A. No, he was in the hospital twice.
Q. Why did he go back the second time?
A. As I recall, the doctor, Dr. Browse, wasn't satisfied with his condition and he wanted him to go back for further examination and observation, if I recall it.
Q. Did he go back?
A. He did go back, yes, sir.
Q. And then he was released?
A. Yes, sir.
Q. Did you notice any—what type of boy was he when he was a young boy, before the accident?
A. Well, he was a normal youngster, just like the rest of

the children we had at home. He behaved in the same manner, got into the same little difficulties all children do, and acted the same, as far as I could tell.

Q. Did you notice any change in his condition after the accident?

A. Yes, sir.

Q. Will you relate some of the things that you noticed about his condition?

A. Well, one of the things was that he wouldn't take constructive criticism; he would be sullen about it. Other boys, the children that I had at home, I would always make it a [fol. 273] point when I wanted them not to do something, to explain why I didn't want it done; but with Morris it didn't do any good. He paid no attention to me at all. If I would tell him something, not to do it, he invariably would go and do just what I told him not to do.

Q. Is there anything else that you noticed about him?

A. Well, he had a lot of trouble in school. It seemed that he was very backward with his studies and fought a good deal with his teachers, all through his school period. In fact, they got so disgusted with his activities and the way he conducted himself that they finally just sort of pushed him through and gave him a diploma from grammar school, and I think he had only about a fourth grade education.

Q. What school?

A. I believe it was Sabin school, eventually.

Q. Was that your neighborhood school?

A. No, sir; that was a school located on the east of Portland some place.

Q. Why did he go away over there to school?

A. That is a school, or was at that time, for backward children, for children that were not making good grades and keeping up with the rest of the class.

Q. What was his—with reference to the manner in which he conducted himself, was he talkative, or quiet, or what was he? Will you explain that to the court?

A. Well, he was quiet to a certain extent, that is, he didn't say much around me, that is, when I was home he didn't give me any trouble or act up. But my family would report to me upon my return from work that Morris had [fol. 274] done this or that and was out of line; he had

been disrespectful to his mother; he had sassed her or he had—oh, I don't know; he just made them a lot of trouble at home when I wasn't there; I know that.

Q. When did he first get into serious trouble?

A. When did he first get into serious trouble?

Q. When did he first get into trouble, if you know?

A. Well, he was hurt, as I recall, in August, and I believe it was mid term before we started him to school. At the request of the school authorities we started him, I think, in January of '34. In the spring of '34 he started pilfering money from a cash register in a service station which was across the lot from where we lived. He got acquainted with the service station man, and the service station man would—got used to seeing him around and nobody paid much attention to him; but when the man's back was turned he would open the cash drawer or the cash register, whatever it was, and take out a sum of money, a small sum,—I don't think it was very much at first.

Mr. Collier: If your Honor please, it appears—I don't want to unnecessarily restrict the testimony of this or any other witness, but it appears quite plainly that the witness is giving hearsay. I ask that he be restricted to what he knows.

The Court: I know——

Mr. Ryan:

Q. When was this this?

The Court: —Mr. Leland, the reason for this objection and my ruling sustaining it is this: When you say that he pilfered money and did various things, you, I take it, were not present at the time and did not know about it. Anyone who knows, who saw the boy, or to whom he admitted these [fol. 275] offenses, could testify; but one may not say what he heard from someone else. You understand that?

The Witness: Yes, sir.

The Court: So you are limited in your testimony to your own observation of the boy through the years and what he did and didn't do, so far as you know, that would throw some light upon his mental condition and development. All right. Next question.

Mr. Ryan:

Q. Did the boy admit this to you?

A. Yes, he admitted it to me.

Q. How old was he then, Mr. Leland?

A. Well, he was a little over seven, I believe about seven and a half years old.

Q. Was he that old?

A. I believe he was.

Q. How was his health?

A. Pardon?

Q. How was his health?

A. Health?

Q. Health, physically?

A. Well, he was a healthy youngster. He had a good appetite. The fact is, I gave the boy more than the rest of the children, every meal. He enjoyed his food and was in normal, healthy condition, I would say.

Q. Did he complain about anything?

A. Not at that time, no.

Q. Did he complain about something later?

A. Yes, sir.

Q. What was it?

[fol. 276] A. He complained that he had a headache and he took a great deal of aspirin tablets.

Q. Was this just an isolated incident or was it several times?

A. Oh, it was for a great length of time.

Q. How old was he then?

A. Oh, I would say he started complaining of headaches when he was about 14.

Q. This continued for how long?

A. Well, it continued, to my knowledge, up until the time, of course, that he got into his first serious trouble and was sent away. I know——

Q. How was his temper when he was a small boy?

A. Before the accident?

Q. No, after the accident?

A. He was sullen if corrected or if we tried to get him to behave himself.

Q. Well, how was he if you didn't say anything to him?

A. If you let him do as he pleased and didn't try to correct him, he was all right.

Q. How was he before the accident?

A. Well, he was all right, only he didn't get into the scraps and things that he did after the accident. He wasn't always in trouble.

Q. Has he ever had any trouble with you?

A. Considerable trouble with me, yes, sir.

Q. Relate some of the incidents.

A. Well, my one big fault was, with him, that I wanted him to get employment. I am speaking of the time when he had received his diploma from grade school and was laying [fol. 277] around the house doing absolutely nothing, and I wanted him to get a job and get to work. I felt he would have less opportunity to get in trouble. But he would refuse to work; he absolutely refused to work. He told me that a man who worked was a sucker; that it wasn't necessary to work. We had a lot of arguments over that. I even helped him get a job, had my friends help him get a job, and the longest he stayed on any job was, to my knowledge, twenty-five minutes he kept one job. That was my biggest difficulty with Morris.

Q. Did you ever have any fights with him or anything of that sort?

A. Fights? You mean fist fights?

Q. Physical encounters.

A. Yes; over this subject of going to work; staying off the streets at nights.

Q. Did he ever attack you?

A. Well, he threatened to attack me several times. He said if I wasn't his father or I wasn't in my home, he would attend to me.

Q. Well, did he ever attack you? Recall to your mind the incident you related to me down at the office. I realize you don't want to go into it, but you recall you went over this matter with me?

A. I want to be fair; I don't want to say or do anything that will—I don't know how to express myself, but I want to tell the truth and I am here to tell the truth, and to your question, did he ever attack me, I don't know whether he was serious about it or whether he really meant business or not, but I will have to say that he did attack me.

Q. How?

[fol. 278] A. Well, it was during a discussion about getting a job and staying off the streets at night and behaving himself, and I couldn't get him to say he would. He wouldn't go to work or even attempt to find work. So I said "Well, if you are that lazy and shiftless, if you will just stay in off the streets at night and help your mother with the housework, I'll continue to feed you and clothe you, although you are a man." And, I don't know, one word led to another and I perhaps was losing my temper and I probably cursed him, and he swung at me and backed me up in the corner and said "I could kill you as easy as not." Does that answer your question?

Q. Did he have a weapon?

A. He had a knife.

Q. What was he doing with it?

A. He was waving it around during this argument.

Q. Was he calm and collected during the argument?

A. How?

Q. Was he calm and collected during the argument?

A. Was he calm and collected during the argument?

Q. Yes.

A. I wouldn't say he was calm and collected.

Q. What was his temper, one way or the other?

A. Well, he was angry, of course. We were arguing.

Q. Describe the anger.

A. Well, I am hard put to, to find words to describe the anger. He was just angry. He was mad. He had a mad color in his eyes, a mad expression on his face. You could tell that he was mad, which he was always mad, of course.

[fol. 279] Q. How long did he hold you with the knife?

A. Not very long.

Q. How did you get away?

A. I broke away from him.

Q. Did he have—how long did he have fits of temper and anger?

A. Every time you attempted to correct him for some misdemeanor.

Q. How often would that happen?

A. Well, between him and I, we were frequently at odds; I would say practically every day; because he wouldn't do what I wanted him to do and straighten up.

Q. Did you go to the authorities about this matter?
A. Did I go to the authorities about this matter?
Q. Yes.
A. Numerous times.
Q. Did you get any help from them?
A. No constructive aid, no, sir. I got a lot of advice, what I should do and what I shouldn't do; and all the times I was to the authorities for help with Morris there was only one gentleman or official in the police department that showed me any cooperation whatsoever. He did to the best of his ability.
Q. Who was that?
A. A man named Andy Heckman.
Q. Did you have any other serious trouble at home with him?
A. Well, I had a great deal of trouble about the fact that he wouldn't stay home; also the fact that he seemed to like to associate with women and girls when he had no visible income, no means of taking them out and showing them any fun or anything. And I used to say "Why do you want to keep company with So-and-So, and why do you insist upon [fol. 280] being around her when you can't take her to the movie?" He didn't ever have money enough to take her to the movie, and it looked like he should get a job and get work first and then talk about girl friends afterwards.
Q. Did he have any other trouble at home, I mean with any other members of the family?
A. I was told by my wife——

Mr. Collier: I will have to object to that.
The Court: You couldn't testify to what she told you.
The Witness: I beg your pardon, sir.

Mr. Ryan:

Q. Did he tell you anything?
A. Who?
Q. Did he tell you anything about this, Morris Leland, did he mention anything about this incident you are going to testify about and that you said your wife told you about?
A. Did who mention?
Q. Morris Leland, your son.
A. Oh.

Q. You can testify to anything he told you about.

A. Well, upon questioning him one time after something had come to my attention, he admitted that he had attempted to rape a woman friend of the family's, a woman much older than he is.

Q. Any other instance?—How old was he then?

A. How old was he then?

Q. Yes, approximately.

A. Approximately,—it was during the war. He was probably 17 or 18, I would say.

Q. Are you sure of that?

[fol. 281] A. You asked me as to the approximate age and I am doing the best I can to give you an approximate age.

Q. Did you have any other trouble with him?

The Witness: May I ask a question, Judge?

Mr. Ryan: I have no objection.

(A discussion was had between the witness and the court, off the record.)

The Witness:

A. At one time while we were still living in St. Johns he attempted to rape his own sister.

Mr. Ryan:

Q. How old was he then?

A. Let's see: Probably 15; between 14 and 15 years of age.

Q. Anything else that he did?

A. Well, he had—didn't seem to care how much difficulty he put his family into. He would steal money at every opportunity. He would—one night I watched him. I pretended I was asleep. He came in late and I was laying there awake and I watched him go through my clothes very carefully, search every pocket, for money. I assume he was looking for money. On another time his younger brother caught him, saw him, doing the same thing to him. On several occasions he stole a considerable sum of money that belonged to the Oregonian Publishing Company that my boys had collected on their paper routes, and went away and

spent it and wasted it all, and we never saw him, of course, until the money was all gone, and we had to make it up.

Q. What about the incident when he tried to burn down the house?

A. Well——

Q. Tell about what led up to that, if you will.

A. Well, I go to work every morning early, about three [fol. 282] o'clock in the morning, and one morning when I stepped on the back porch I found liquid on the back porch, and I smelled it and it was stove oil, and it was all over the back porch, and the can it had been poured from was still laying there on the porch. And the previous night I had had considerable trouble with Morris, and he had said, on his parting remark when he left the house, that "I'll get even with you for this." I believe it was the time that I told him that he was beyond the place where I could handle him any longer, what I did for him he didn't appreciate, and I believe I told him he would have to leave the home and not come back any more. I believe that is the incident.

Q. Did you go to the authorities about it?

A. Yes, sir.

Q. Did you get any help?

A. No, sir.

Q. Did you go to the authorities about these other acts?

A. Yes, sir.

Q. Did you get any help?

A. No, sir.

Q. Has he been home recently?

A. No, sir.

Q. The last time he was home, where did he sleep?

A. The last time he was home we fixed him a bunk bed. We doubled up two of the smaller boys and fixed him a bunk bed, with an older boy; but he wouldn't sleep in there. He said he didn't like it in there, so he would sleep out on the front room floor by a large oil circulating heater we had.

Mr. Ryan: That is all.

[fol. 283] Cross-examination.

By Mr. Collier:

Q. Now, Mr. Leland, I appreciate your situation here, but it is necessary that I ask you some questions.

A. I will do the best I can to answer them.

Q. As to the automobile accident where you stated that the driver had lost control of the car and had run the wheels over the head of the defendant, of course you didn't see that?

A. No, sir.

Q. And if another witness who actually did see it would say that he, that Morris was thrown free and clear from the car, you wouldn't be able to contradict that, would you?

A. I don't quite follow you there.

Q. If another witness who actually did see the accident with his own eyes had previously testified here that the defendant, Morris Leland, was thrown clear of the car at the time of the accident, you wouldn't be able to contradict him, would you?

A. No, I wouldn't be able to contradict it.

Q. And if the witness that I refer to had stated that the driver brought the car to a stop quickly, you wouldn't be able to contradict that? You didn't see it?

A. I didn't see it. However, I was on the scene immediately after the accident before the car was moved.

Q. If another witness who actually saw it said that the car was brought to a stop rather quickly, you wouldn't be able to contradict that?

A. No, I couldn't.

Q. And he was in the hospital how long?

A. I am just doing the best I can. Approximately, I [fol. 284] think he was in the hospital the first time three or four or maybe five days.

Q. And the second time, approximately?

A. Approximately a week, I believe.

Q. And he did attend school regularly after he had started in the mid term, as you stated?

A. Yes, sir.

Q. And how old was he when he ceased to go to school further?

A. I don't think he went to school, any school, after he was 14 years old.

Q. Now, you have made mention that when you would tell him to do something he would do the opposite?

A. Yes, sir.

Q. Now, of course, Mr. Leland, you found that same thing true in all the rest of the children at times, didn't you?

A. No, sir, I can't say that I did. If—I always made it a point to tell a child why I thought it was best not to do something.

Q. Yes, I appreciate that. But didn't you find all of your children each and every one of them, went through certain periods where they were more difficult to control than others,—than other periods, I should say?

A. Well, that is a kind of a——

Q. Well, isn't that true?

A. Well, if you put it that way, yes. I guess there are times when a child is more pliable.

Q. And at about nine years of age you found some of your other children resenting control, didn't you, a little bit?

A. Well, if they—I can't recall the children, any of the children, giving me a bad time, with his exception.

[fol. 285] Q. The other children would, of course, on occasions, sass their mother and talk back to her, wouldn't they?

A. Not in the manner that Morris did.

Q. I believe you said he enjoyed his meals.

A. Yes.

Q. He would be at ease and reasonably happy when he was eating his meals?

A. Yes, sir.

Q. And get along with the rest of the family at the table?

A. At the table, yes, sir.

Q. And now you said he had headaches up to the time he was about 14, to the time that he was sent away. Where was he sent?

Mr. Ryan: I object to that. It doesn't have any bearing on it. It is an attempt to bring in the fact that he was sent away. We are not going to make any bones about the fact that the boy has a criminal record. The District Attorney is trying to bring that in at the back door.——

The Court: I'll hear you gentlemen in chambers. We will take a recess. Will you remain seated in the court room while the jury enters the jury room?

(The following proceedings were had out of the presence and hearing of the jury.)

(The objection was argued to the court.)

The Court: All right. I will overrule the objection.

(The following proceedings were had in the presence and hearing of the jury.)

The Court: Read the question, Mr. Reporter.

(The question was read.)

[fol. 286] The Court: You may answer.

The Witness: A. He was sent to the State Hospital in Salem.

Mr. Collier:

Q. At the time he was 14?

A. Well, I don't know whether he was 14 at the time. It is the first time he had serious trouble. And, of course, he was kept in detention here until the hearing, or something, and then he was sent to Salem.

Q. Was that in 1944?

A. I don't know what year it was, sir.

Q. And he was there how long?

A. He was in the State Hospital in Salem for 30 days.

Q. And he was sent back here after that, wasn't he?

A. No, sir. My——

Q. Back to Multnomah County, I mean.

A. Well, he was turned back to the custody of Multnomah County, but he was sent to Woodburn.

Q. And you knew that at the time he was down at the State Hospital he was examined, didn't you?

A. I assume he was examined.

Q. And you know that at the expiration of approximately 30 days he was returned to Multnomah County as sane?

Mr. Ryan: I object to that, your Honor. That isn't proper.

The Court: He probably wouldn't know that.
Mr. Collier: Let's ask him if he does or if he doesn't——

Q. Do you know that, Mr. Leland?
A. I don't know.
Q. And at that time I believe you wrote a letter down to the hospital, didn't you?
[fol. 287] A. I don't believe I wrote a letter. I believe I got a questionnaire from the State Hospital.
Q. Didn't you write a letter in pencil in your own handwriting?
A. If I did, it was at their request.
Q. Pardon?
A. If I did, it was because I was requested to by them.
Q. You had lost the questionnaire, hadn't you?
A. Perhaps I had. I don't remember. I know I got a questionnaire. I remember that.
Q. Didn't you lose that and instead write a letter in pencil to the——
A. I probably did, if I wrote that, I wrote it in pencil.
Q. At which time didn't you state in your letter that it was your opinion that the only thing wrong with him was that he was just lazy?
A. At that time I did, yes, sir.
Q. How long was he in Woodburn, at the institution there?
A. I will have to say I don't know, sir.
Q. Would you say approximately—I am referring to the training school at Woodburn.
A. I know you are, sir. It seems to me, in my mind, that he was in the training school twice. I may be mixed up. I can't remember.
Q. Approximately; the duration is all I want. I wouldn't expect you to know to the day or month.
A. Perhaps three months.
Q. There is one question I wanted to ask you: When he was sent to the hospital after the accident, how long was he unconscious, do you know?
A. That I don't know, sir. I rode with him in the [fol. 288] ambulance to the hospital. I am the man that picked him up from the scene of the accident and put him in the ambulance.

Q. And was he unconscious then?

A. He was, yes, sir.

Q. And did you stay there at the hospital?

A. Yes, for a while I did.

Q. Was he unconscious as long as you stayed there?

A. That is a long time ago. It is hard for me to say with any accuracy. I don't know whether he was or he wasn't. I know I had to get back and go to work.

Q. Did you learn from any of the doctors how long he had been unconscious?

A. If I did I have forgotten it, sir.

Q. I see. O.K. Now, in regard to the attack upon you: I believe you said that you didn't know, or now don't know, whether that he was serious about it or not.

Mr. Ryan: I didn't get that.

Mr. Collier: My statement was, I believe you said that you didn't know whether he was serious about that or not.

Mr. Ryan: About what?

Mr. Collier: About the attack.

Mr. Ryan: Which one?

Mr. Collier: The only attack that he mentioned.

The Court: That is, upon the witness.

Mr. Ryan: Oh, oh, oh. I wasn't paying attention. Maybe that is my fault. I am sorry.

The Witness: Well, now, I don't quite get what you mean

Mr. Collier:

Q. Didn't you say—it is my recollection that you [fol. 289] prefaced your whole remarks with the statement that you were not sure that he was actually serious about it.

A. That is right. When he threatened my life he said he could kill me just as easy as look at me—which he has used that remark numerous times before. I didn't know whether he really meant business or not. It is hard for a man to believe that his own son can say that he was going to kill him and really mean it.

Q. That is quite true. And he had the means with which to do it at the time, didn't he?

A. Yes, sir.

Q. And he did restrain himself at that time, didn't he?

A. I don't know whether you would call the fact that I

broke away from him and picked up an indoor baseball bat that the children had brought home; that happened to be standing in the corner of the kitchen, that he restrained himself or not. I think the fact that he saw me with the bat restrained him.

Q. Until you broke away he didn't actually make any move toward the end of killing you?

A. Well, things happen quick like that.

Q. Did he attempt to strike you with the knife?

A. No, he didn't exactly swing at me with the knife, but he had the knife in his hand and he said he could kill me just as easy as look at me.

Q. I don't question the incident at all, Mr. Leland; I am simply going to the circumstances.

A. Yes.

Q. Up until the time you did break away with him, he could have used the knife on you had he wanted to, couldn't he?

[fol. 290] A. No, I don't think he could, for I didn't give him that opportunity.

Q. I see. Now, when you picked up the baseball bat, what happened?

A. Well, he just took off, that's all. He just beat it out the back door.

Q. Now, as to this oil that you found on the back porch: Do you know that he intended to set fire to the house?

A. I don't know it, no, sir.

Q. Well, did he do any act toward it?

A. How is that?

Q. Did he do any act toward it?

A. I still don't get it.

Q. Did he do any act toward that end?

A. Well, he made that threatening remark as he left the previous night, that "I'll get you for this."

Q. I see. And he didn't say that he was going to burn the house?

A. No, he didn't say that he was going to burn the house.

Q. Well, did you ever tell Mr. Ryan that he tried to burn the house down?

A. Well, I don't think I did. The remark I made to him might have sounded that way, although afterwards I did a lot of thinking on the subject, and I didn't see the oil

poured there and I don't know for sure that Morris poured it there.

Q. Now, I believe you stated that from time to time he would admit to you having stolen money and other articles?

A. That is right.

Q. And when he did so, he told you all about it, did he?

A. Not all about it, no.

[fol. 291] Q. He gave you the high lights of it?

A. No, I wouldn't say that. I would have to question him. I would find——

Q. When you were through talking to him had you learned, felt that you had learned, the complete story, or nearly so?

A. No, I didn't feel that way. I felt I had learned only what he cared to tell me about it.

Q. And when he told you about this attempted rape on a friend of the family, about 17 or 18, how did he come to tell you that?

A. Well, I had heard about it, naturally, and I accused him of it. I confronted him with the information I had and he admitted it.

Q. How old was he at the time you had felt that he was beyond the place where you could handle him, and asked him to leave the house?

A. You mean that I told him he had to get out?

Q. Your statement was that he "got beyond the place where I could handle him and I asked him to leave the house." How old was he then?

A. Well, he was then of age when I told him *be* better get out because he was making too much trouble at home and he had a bad influence on the rest of the family that I had there, and that I felt he could take care of himself.

Q. Did you feel he was beyond your control?

A. That is right. I had felt that a long time ago. I told the authorities that. I made no secret of it.

Q. And you didn't feel that there was any likelihood of reformation?

Mr. Ryan: I object to that question.

Mr. Collier: I can ask him about his statement, your Honor.

[fol. 292] Mr. Ryan: He used that word "reformation" deliberately, and it is a question of change here.

The Court: Well, let's change the term, because it has a legal connotation of improvement or betterment.

Mr. Collier:

Q. Did you feel that he was beyond redemption?

A. Well, I felt that I couldn't do anything with him; that I couldn't, no matter how much I talked and no matter how much I reasoned, that I couldn't help him any; that he had made up his mind that I knew absolutely nothing. In fact, he told me that I was a fool, at different occasions, I was a fool to work and work to do this; and pay any attention to him staying out all night; that he was old enough; that he knew what he was doing. So I felt that my influence with him wouldn't help him any. I couldn't help him any. I couldn't reach him.

Q. Did you feel that he would not change for the better?

A. Well, that is——

Q. In your own mind did you feel that he would not change for the better?

A. Well, in my own mind I had given the boy up as far as being able to make a man out of him, yes.

Mr. Collier: That is all, and I thank you.

Mr. Ryan: This may be improper rebuttal, but——

Mr. Collier: Is it something you would have asked on direct examination?

Mr. Ryan: Yes.

Mr. Collier: No objection.

Further Direct examination.

By Mr. Ryan:

Q. Are you here voluntarily?

[fol. 293] A. No, sir.

Q. Why are you here?

A. I was ordered to be here by the court.

Mr. Collier: Just a minute: He can't cross examine his own witness, your Honor.

The Court: Well, that is entirely in order,——

Q. Were you subpoenaed?
A. Yes.

Mr. Collier: Well, that is proper, yes.
The Court: That is what you wanted?
Mr. Ryan: Yes. I was asking him if he was here voluntarily. I assume I have the permission to go ahead on direct. I prefaced it that way.
Mr. Collier: I have no objection to that if you gave him a subpoena.

Mr. Ryan:

Q. Did you want to come here?
A. No, I didn't want to come here.
Q. How many times did you talk to me before you came here?
A. Well, at least three or four times I talked to you about it.
Q. Now, Mr. Collier made some reference to this, what you told me about this house being burned down. Do you recall telling me that, the first time you talked to me?
A. Well——
Q. Or do you remember exactly what you did say?
A. No, I don't remember exactly all the things I said. If you knew how I felt inside, you couldn't blame me.
Q. Did you talk to anybody about whether you had to be here, besides me?
[fol. 294] A. Yes, sir.
Q. Who did you talk to?
A. I talked to Mr. Collier there. I got his legal opinion on the matter.

Mr. Ryan: I might say, your Honor, at this time, that Mr. Collier very fairly advised Mr. Leland as to his rights, and there is no implication—I just wanted that to be clear.
Mr. Collier: I want to go into that.
The Court: Go ahead,—you are through with your redirect?
Mr. Ryan: No——

Q. What was he sent down to Woodburn for, the first time?

A. Are you asking me?

Q. Yes, sir.

A. Well, I got it kind of confused in my mind. I have it in my mind that he was in Woodburn twice, on two different occasions, although we looked around home and we could only find one commitment paper. Once he was picked up for stealing automobiles and I don't know what happened or where he was sent for that. I am kind of confused whether he was in there twice or just once. It seems to me that he was in there two different occasions, and if he was, the first time was for car stealing.

Q. And the second time?

A. The second time he was returned from Salem from observation. It was the time he had raped a woman.

Mr. Ryan: That is all.

Further Cross-examination.

By Mr. Collier:

Q. Mr. Leland, I hadn't, I promise you, intended to go into this question of your coming to my office, because I [fol. 295] believe you asked me if what you said to me would be confidential.

A. That is right.

Q. And I said it was.

A. Yes.

Q. But counsel has opened it up, so that breaks the promise. Now, you come to my office and asked me as to whether you had to be here and testify, didn't you?

A. I asked you, yes. I was confused in my mind. I asked you where—whether I was served with a subpoena, would I have to come and testify against my people.

Q. Don't misunderstand. After asking me if you were served by subpoena, whether you would have to come and testify, didn't I say "If you are served by subpoena, it is an order of the court and you will have to appear"?

A. Let's get it straight——

Q. Is that the substance?

A. I hadn't received a subpoena——

Q. Yes.

A. —when I came to your office, but, however, I felt in my heart that I was going to be subpoenaed. I wanted to know what steps I could take or whether I had any outlet whereby I wouldn't have to appear. Is that an answer to your question?

Q. That is not. Didn't I say to you, "Mr. Leland, it is your—you didn't ask to come here; you are the father; it is your job, your duty, to pitch and testify for your boy,"—didn't I tell you that?

A. Yes; words to that effect, you did say. I don't know that you said it word for word.

[fol. 296] Q. Didn't I further say if worse comes to worst, that later you would feel awfully sorry if you didn't?

A. Yes, you did.

Q. That is all on that point. Now, I don't like to ask you these questions, Mr. Leland. Mr. Ryan brought out something here in regard to this Woodburn rape of a woman. That being true, I shall have to inquire into it. He had been sent there in 1944, wasn't he?

A. I don't know whether it was '44. I have no record of the dates he was sent there.

Q. And he was sent there after he was returned from the State Hospital to Multnomah County?

A. I assume he was.

Q. That is your memory; it follows.

A. Well, it follows. I didn't see him in Portland. I saw him in Salem and the next I heard from him was in the Woodburn Training School.

Q. Did you talk to Morris Leland about that charge?

A. I don't recall that I did. In what way do you mean, sir?

Q. Did he tell you about it, about the facts of that case?

A. No.

Q. Nothing at all?

A. I don't believe he did. I don't recall it.

Mr. Collier: That is all. Thank you.

Mr. Ryan: That is all.

The Court: That is all, sir.

Witness excused.

The Court: Two o'clock, Ladies and Gentlemen of the Jury.

[fol. 297] November 4, 1949.

DR. HENRY H. DIXON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your name, please?
A. Henry H. Dixon.
Q. What is your profession or occupation?
A. I am a medical doctor, limiting my practice to psychiatry.
Q. Are you licensed to practice in the State of Oregon?
A. I am.
Q. Doctor, will you give us some of your background, your education and experience, please?
A. Graduate in medicine, Washington University, St. Louis,——

Mr. Ryan: Pardon me, doctor, can you hear?
Jurors: Yes.
The Witness: A. (Continuing) National Research Council, Rockefeller Foundation; Commonwealth Foundation in Psychiatry in Colorado; and since '32 Professor of Phychiatry at the University of Oregon Medical School.

Q. You are practicing in private practice here in Portland?
A. Yes, I am.
Q. Where are you located, doctor?
A. 707 Medical Dental Building.
Q. And you are here—have you examined the defendant?
A. I have, yes.
Q. At whose request?
[fol. 298] A. At your request, Mr. Ryan.
Q. And who is paying you for that, doctor?
A. I haven't inquired into that yet. I don't know.
Q. Will you give us the result of your examination and tell us, first, what it consisted of and then what your findings were?
A. I was called by Mr. Ryan to examine the Leland boy

and he was at that time at Rocky Butte. I made the examination October 5th and our examination of this individual consisted of an attempt to evaluate the personality, the behavior, the general reactions of the individual. And in the background of making such an examination we have to spend a certain length of time learning what is known about human behavior. Today we still have a good deal to learn on that and certain methods of approach have developed as time goes on.

We know that people can fall into certain categories of behavior. We know that there are certain situations where they live part of the time out of the field of reality and part of the time in. We have means of trying to detect that. We know that there are certain disturbances in the character of each and every particular individual that become a part of them, their ways of thinking and acting and doing, and this question in regard to evaluation, we must be able to attempt to determine their general character of personality, their ways of thinking and acting as they relate to it. Quite a factor is the freedom with which the individual will communicate with us in examination. I felt that the time I spent with this boy was quite adequate because I sensed no guard in his talking to me at the time we made the examination. You want me to go on with the conclusions of the examination?

[fol. 299] Q. Yes. I would like to have you tell us of what your examination consisted and your conclusions.

A. After evaluating this boy's reaction as completely as we could we arrived at the conclusion that he did have a character disturbance and that character disturbance falls under a classification that we have arrived at in medicine, out of trial and error and experience over a long time. This reaction we call a psychopathic reaction; in definition, a type or pattern of behavior in which the individual lives from day to day without plan, without day dreams, without any constructive design on the future, a pattern in which they act entirely on an impulsive plane, that is. Again, we regard this pattern as being a product of the combination of hereditary influences, their early development, the sum total of their environmental experience in their early period. It is a pattern that is quite characteristic when you see it, because this total lack of any

planned response that deals with the future in any sense characterizes this group of cases.

Q. Did you find that the defendant fell into that category?

A. I did, yes.

Q. Did you question him as to his past history?

A. I did, yes.

Q. Will you give some of the findings you made there?

A. Well, he relates beginning disturbances in conduct of this unplanned character dating well back into his very early period of life. The first situation we considered was the situation that he has got into in relation to possible custodial or legal handling. Further back, we find minor [fol. 300] breaches of behavior, like suddenly withdrawing from school without too much reason, staying out for periods of time and some discipline in getting him back into school; minor episodes in behavior that would be irritating to the neighborhood; in gradually beginning to accomplish asocial things in the direction of appropriating property that didn't belong to him. It runs into the scale when he began to take cars a little farther along, and then in which, on impulse, he had certain discrepancies in sex behavior that related to a semi-impulsive nature of satisfying his own urges and interests without any planning.

Q. Do you have reference to this time he was charged with rape, doctor?

A. What?

Q. Do you have reference to this time he was charged with rape?

A. That is right.

Q. Would you describe that to the jury?

A. As he describes this situation, that a relatively— the whole thing comes out in his description as a relatively unplanned thing in which he was out running around. At that time he relates that he had acquired a gun. Without any particular obvious intention he runs into a situation where this woman is walking along the street. In his own attitude you don't sense any plan at all, but just a combination of situations where he fell into a situation where he realized that here was a girl and here was a gun, and the situation developed from that point. Now, I felt very definitely that it is the characteristic story that those people

tell; a coincidence determines what they do and not planning [fol. 301] in any sense.

Q. Is that characteristic of this general classification——

A. It is.

Q. —of mental disorder?

A. Yes.

Q. Did you make any check into his past record other than a—did you talk to him about his past record, other than this that you brought out?

A. Yes. I spent close to three quarters of an hour going back in relation—attempting to see if at any time in the past we could find any indication of ever having planned any procedure, and I couldn't find the slightest inkling.

Q. Have you made a—any check as to his record when he was before the authorities of the school?

A. I did. I asked for a check on what information they had in relation to his early difficulty in handling the school situation. We find—we had a number of reports of absenteeism from school, where he wouldn't manage to plan to get there even after he started; where he had been in minor discrepancies of behavior that were a bit irritating and where he wasn't applying himself to the average school work in any sense, and that he was regarded as an isolated child, a person who was different. As a matter of fact, there is indication in this early period that there has been considerable contact between the parents and the school on the basis of the fact that the boy was not making an adjustment to school as would be anticipated with the average boy.

One other thing: During the course of his poor adjustment to school, in this early period they did have one test, what we call an "Otis Self Test." This test was run along [fol. 302] when he was about 13, and at that time it indicated his intelligence was normal; the rating of the test was about 90, which is about average intelligence. That figure conformed to our evaluation of his inteligence at the time we were talking to him.

Q. Well, is this difficulty in intelligence superficial or something deeper than that?

A. This is a deep character disturbance in which the

individual lacks foresight and planning and the ability to organize the things they do in life.

Q. Is there something that is basically wrong with his mental processes? Do you understand what I mean?

A. We all use these terms differently. The attorneys and doctors have a different set of terms entirely, and the word "mental" means a little different—mental, mental image; the ability to record, transmit and associate,—that pattern, as such, is intact. That factor that we call foresight or judgment is the factor that is not intact in these people. They can repeat anything. You have them learn a certain paragraph and they will repeat it; if they spend a lot of time, they can repeat it back. But as to what to do, they have no foresight, no plan ahead; there is no organization; and consequently they don't handle material in such a way that it gives opportunity for them to fit to the average social scheme or pattern of behavior that other people do. As an illustration of that particular situation, in talking to him, there was one thing that came out all the time: He would steal a car. Well, he would show up in the same neighborhood with the car, around the same district, and he was [fol. 303] picked up, and it was anticipated that after he was out of jail he would be back in, because he didn't even show the foresight to get out of range of being picked up. There was no attempt—he didn't even have the organization to avoid running into entangling with the law again; so it is one of these unplanned existences where everything is on the basis of the impulse of the moment.

Q. How does this affect his free will or volitional apparatus?

A. Well, will, according to our lay interpretation, would mean the ability to plan and follow through on some organized system; so you couldn't anticipate them showing what we call will with this particular type of reaction.

Q. This has to do with the ability to will something?

A. That is right.

Q. How does this affect his ability to form a purpose?

A. Same issue entirely, that is, in all of those words you are using there, the variations in English that we use to define organized planning or purpose in life.

Q. Is there any question in your mind as to the category he falls in?

A. Not the slightest.

Q. Why do you say that?

A. The pattern is so typical that I think there can't be much question about the character of it, and we have seen it many times, this particular pattern. The individual is unable to plan ahead and is constantly in a jam all the time. It has been one of the sore points of criminal handling, psychiatric handling. As long as we know that it is a fixed pattern that has no possibility of alteration, with any of the tools that we have at the present time.

[fol. 304] Just as an example of that particular situation, these individuals who fall under this classification or category, every move we have made after the adolescent period, you will notice a certain number of them, from ten to twelve to fourteen, in that zone, if they are able to supply the right type of organized planning, it will induce some moderation in the responses; but in my experience it is a fixed pattern after adolescence and every move we have made to alter it has resulted in failure, as far as we are concerned.

Q. Would you say his case is an extreme one or a mild one, or a typical one, or——

A. We have seen several hundred of these reactions and I might state it this way: That I have never seen an individual that would fall under the classification of psychopathic behavior, that was more complete. He lacks organized or planned behavior. To me, he would behave impulsively in any situation he would be placed; and being the trends are dangerous, he would be an exceedingly dangerous individual in any situation that he is placed in.

Q. How long does it take for this condition to develop?

A. In definition, as I have described it, it is actually a lack of development and not a pattern,—that is, it could be. That is, the things that go to build planning, foresight and that sort of thing, are left out, either by lack of structure or by some lack of pattern that is necessary for the development of personality or character in the individual.

Q. How early would this be recognized?

A. Most certainly by the very early school period, and in this case, as in so many of these, it was, according to all we can gather, recognized at that time.

Q. Was there anything they could do at that period for him?

[fol. 305] A. As I said before, we have seen a certain number of these individuals where they could be placed under smooth, regular handling, so that a pattern of behavior was established and the attachment and planning towards the future started in a completely orderly way, where they seemed to have been able to become successful citizens. Now, I think to a degree, that depends on the degree of response, and another thing in being able to have what we call situations in which control of an orderly environment—in which you can shape the whole pattern far enough to create some training pattern there.

Q. How would this affect his ability to premeditate?

A. Well, I doubt if he has ever premeditated for anything longer than a split second in his life. I couldn't find any indication that he had.

Q. What about—what do you mean by that?

A. Well, in every situation, as it is described the "tension of life," he has run into something that happened to have that same primitive approach without foresight; he is carried through with it. It is just, again, a totally impulsive type of behavior without any organization.

Q. Not any real premeditation?

A. I can just—in using the same set of terms that we have been using, there is so much variety; you are using words like "will power" and I use "foresight," and we might use any number, which would mean that a person cannot plan or organize ahead, and that is exactly the situation. Here is an individual that cannot plan.

Q. How would it affect his ability to deliberate?

[fol. 306] A. He has not spent any time deliberating, I can assure you.

Q. How does he approach the moral problems of life?

A. If, with this psychopathic type—and it is true in this case—if you sit down and say "Here is Rule 7; it says so and so and so," you read it over for a number of times and you say "What is Rule 7?"—and they can give Rule 7; but having no foresight or organization, Rule 7 doesn't mean anything to speak of to them, as far as that goes.

Q. Does that apply to right and wrong?

A. That applies to right and wrong as well.

Mr. Ryan: That is all.

Cross examination by Mr. Collier:

Q. Dr. Dixon, as I understand it, he has, according to you, a character disturbance.

A. That is right.

Q. It is known as a psychopathic personality.

A. That is right.

Q. And that being true, he is not a mentally sick person, is he?

A. According to your legal definition, if I can just define the two different terms, according to the legal definition, they have not in the main been regarded that way, although there are certain beginning changes in some states that begin to regard them as legally not responsible, from a medical standpoint,——

Q. (Interrupting.) Just a minute, doctor——

The Court: Read that answer, Mr. Reporter.

(The answer was read.)

Mr. Collier: Your Honor——

The Court: (Interrupting.) Read the question, Mr. Reporter.

[fol. 307] (The question was read.)

The Court: The question has been restated to the doctor, and he may answer. If the answer is objectionable, I may entertain an objection. Do you want to move to strike?

Mr. Collier: Yes. He referred—I can tell the court—he referred to codes in other states.

The Court: Will you read what you have, Mr. Reporter?

(The answer was read.)

Mr. Collier: I want that stricken. I ask that be stricken in regard to other states.

The Court: I will strike the last statement and the jury will disregard it. Read the question again, Mr. Reporter.

(The question was read.)

The Court: You may answer.

The Witness: Now, in the initial part of the question you asked me if he was legally insane.

Mr. Collier: No, I didn't.

The Witness: You want to know whether medically he is sick or not? Is that the question?

Mr. Collier: No.

Mr. Ryan: That seems to be the question. He said: "That being true, he is not a mentally sick person, is he?"

The Court: Do you wish that question answered?

Mr. Collier: Yes.

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

The Witness: The question can't be answered without [fol. 308] qualification, I believe, because——

The Court: You may do so,——

Mr. Collier: You may do so.

The Court: You may answer and explain.

The Witness: A. As far as the definition I have given, this individual is lacking in certain equivalents that we associate, not with the intellect, but with the ability to exercise judgment, and that is mainly evidenced, according to our medical definition of insanity, that is, the not living in the field of reality or lacking certain characteristics.

Mr. Collier: Q. Generally speaking, wouldn't you say that he is a psychopathic personality without psychosis?

A. I would.

Q. What does that mean?

A. I have given a fairly complete definition of that just previously here: that he is an individual with unplanned behavior that acts on impulse entirely.

Q. What does "without psychosis" mean?

A. "Without psychosis" means that he doesn't show any bizarrity of behavior as it is characterized in our definite medical classifications. In other words, he is not a depressive; he doesn't live in the field of reality. Those classifications—he doesn't have any of those reactions. He has a lack of development.

Q. And it means that he is legally sane, doesn't it?

Mr. Ryan: I object to that. That is a conclusion for the jury to draw, and only for the jury to draw.

The Court: You are cross examining the doctor, who offers himself as an expert. It is proper. You may proceed.

Mr. Collier: Read the question.

(The question was read.)

[fol. 309] A. As I understand it, that is a legal matter, but as I understand it, the definition of legal sanity is the ability to recognize the difference between right and wrong and to be able to assist in their own defense.

Q. No,—"Assist in their own defense",——

The Court: Leaving out "Assist in their own defense." I think the instructions to the jury will be the ability to distinguish between right and wrong at the time of the commission of the offense.

Mr. Ryan: If the court please, at this time I quote the case of Lehman v. Knott, 100 Ore. and that went to the Supreme Court——

Mr. Collier: I will withdraw that question and rephrase it.

Q. It means that he doesn't know the difference between right and wrong, doesn't it?

A. On an intellectual level, yes. He can remember the rules.

Q. Now, you say that he is unable to plan ahead?

A. That is right.

Q. Now, doctor, you are talking about something more than the snap of the fingers, aren't you, as to time?

A. In relation to planning ahead?

Q. Yes.

A. Judgment of the situation, that is, to pass a judgment on anything in the future. I meant that to be relatively all-inclusive.

Mr. Collier: Read that. Mr. Reporter, will you read the last answer.

(The last answer was read.)

Q. You would state that he doesn't have what you call good judgment?

[fol. 310] A. That is quite correct.

Q. But whether his—strike that—you distinguish, do you

not, between having good judgment and being able to plan anything?

A. Most certainly, yes. You asked me if I considered that he didn't have good judgment, and I answered that.

Q. You don't consider that he does?

A. No.

Q. And you distinguish between having good judgment and the ability to plan anything?

A. Yes, definitely.

Q. He can plan to do a thing but it may be the worst judgment to do so?

A. That is right.

Q. So, if—you have mentioned a rape case: Now, if he would see the woman involved, he could have the sex urge and at that time plan to satisfy it, couldn't he?

A. That isn't a preplanned situation but simply the following through of a stimulus that comes at the time; that is, that—I am sure that all this came from the primitive; the response of the animal that started the stimulus and he followed through. That doesn't include foresight or planning on it.

Q. You don't answer the question: I am saying that he could plan; he would have the ability, even though it might be a plan of only that long (snapping fingers); he could have the ability to plan to satisfy his desire, couldn't he?

A. I answered that question, I think.

The Court: Let's have the answer again.

Mr. Collier: You still don't answer the question, whether [fol. 311] he was able to do so.

The Court: Read the question again, Mr. Reporter.

(The question was read.)

The Court: You may answer.

The Witness: A. I stated in there that was following a stimulus through a certain number of factors that a person would follow through on almost an instinctual level. I don't consider that planning. To me, planning means a certain amount of foresight or organized thought preceding the situation.

Q. He would consciously consider the desire to satisfy that instinct?

A. On the basis of the symbol or stimuli, a certain situation will call out a certain reaction that will carry through to completion almost automatically.

Q. And if he had told you that at the point of a gun he took this woman a number of blocks into Pier Park, at which time he caused her to undress, and there raped her, would you say that he didn't have the ability to plan it?

A. I would.

Q. How do you come to that conclusion?

A. Because here was a chain of events that started the primitive nature.

Q. Would you say that he didn't have to make some plan to walk her a distance and into a park where it was secluded?

A. I would say he is already acting on impulse at that time.

Q. And if he wanted a person to be dead, he has the ability to consider that fact consciously, hasn't he, that he wants that person to be dead?

[fol. 312] A. Will you read that over again?

(The question was read.)

A. I can't get the significance of the question, quite, here.

Q. You mean you don't know what that means?

A. No, I don't.

Q. Wouldn't he be conscious of a desire to have that person——

A. That clarifies it,—conscious of a thought in relation to a situation?

Q. Yes.

A. That he would be able to maintain a conscious awareness of a situation of that kind, surely.

Q. Suppose, doctor, that the defendant had told you, in regard to this crime, that he attempted to have sexual intercourse with the girl; that he learned that she hadn't had intercourse before; and that he had hurt her when he tried; and for that reason, those reasons, he didn't complete the act. Would you not say that he had a—knew the difference between right and wrong there?—strike that—would you not say that he was conscious that he was doing something wrong, and quit because of it?

A. I think unquestionably he was conscious that he was doing something that the individual didn't like.

Mr. Ryan: What page?

Mr. Collier: Page,—the last question on Page 28,——

Q. Will you listen to those following questions and answers, doctor? I may say to you that this is an exhibit in the case. It is a statement which was taken from the defendant at the police station concerning the commission of [fol. 313] this crime. The questions—the answers are given by the defendant Morris Leland: "Q. Well, did you pick the piece of steel up to use it on her if necessary? I believe you said you did. A. No, not unless I decided to kill her. Q. And then you did feel that you might use that piece of steel to kill her with? A. No, not to kill her with, to knock her out with. I didn't need this steel as long as I had the knife to kill her with. Q. I see. A. If I decided to kill her. Q. That is, you did think of the possibility that you might kill her? A. Yes, I did. I did Friday night." In the light of that, would you say that he couldn't plan to kill her? A. It was not my impression it was planned, but later on under pressure and due to impulse at the time.

Q. What are you referring to, this reading or what you found out?

A. The same thing, because he told me relatively the same story at the time.

Q. Page 30—29: "And now, Saturday morning, you woke up and she wasn't right at the spot that you were? A. That is right. Q. And she was, you said, about twenty feet away? A. That is right. Q. And you thought that she was going to run away? A. She would have if I hadn't of woke up. Q. And did you say anything to her? A. Told her to come back. Q. And what did she do, did she come back? A. She come back. Q. And was there any more words? A. I never said nothing else. Q. And what did you do?—A. Nothing. I just told her to stay over there awhile because I was about to wind her off." Would you not understand from that that he was going to commit some act and had considered it?

A. I think a great many things had occurred to this boy during that period.

[fol. 314] Q. You know well enough that you can answer

the question and then explain it, but I want you to answer the question.

Mr. Ryan: What was the question?

The Court: Read the question.

(The question was read.)

The Witness: A. In answer to that, I can't see that that is—that was a threat, but I can't see what it has to do with any definite plan on his part.

Mr. Collier: Q. You don't understand it to be a threat? He is stating what he thought in his mind—"Because I was about to wind her off." In other words, he was going to act in accordance with what he had planned. Isn't that what it means?

Mr. Ryan: If the court please, I don't think it is his position here to say what this confession means. That is for the jury . . .

The Court: He is asking a question. The question is proper.

The Witness: A. I feel that the idea had occurred to him but I didn't feel it was an organized plan. I didn't get the same impression in talking to him.

Mr. Collier: Q. You said you doubted whether the defendant could premeditate for more than a split second. Do I understand you mean he could, at least for some space of time, premeditate?

A. Well, I think a lot of thoughts would go through; it would be logical to the situation, but I don't believe there is any foresight or planning, as I have stated, and I don't believe the boy was able to exercise foresight.

Q. Can I ask you to answer the question and then explain it?

The Court: Read the question.

[fol. 315] (The question was read.)

The Witness: A. I don't believe he could premeditate. That was the answer.

Mr. Collier: Q. You didn't say that; you said more than a split second.

A. I don't believe——

The Court: Talk louder, doctor.

The Witness: A. —I don't feel that he could premeditate or plan; that is, in any act, of course, there is a series of impulses and things followed through; but, just as we had this definition, I don't call that state of mind planning but rather a reaction to a situation that has been presented.

Mr. Collier: Q. When you said that he couldn't premeditate for more than a split second, did you mean that he could premeditate for a split second?

Mr. Ryan: He has already answered that question.

The Court: No. You may inquire. I will overrule the objection.

The Witness: A. I used that as a col-oquial term. I meant to state that he couldn't plan, and that is one of these usages in English that I used it; not in terms of time at all, but the idea that the action was on the basis of impulse and not planning. It was an erroneous use of the word.

Mr. Collier: Q. Well, he could consider the doing of an act, could he not?

A. Yes.

Q. You say you don't think there is any possibility of any alteration in this defendant?

A. Of any what?

[fol. 316] Q. Alteration.

A. Alteration?

Q. In his character, personality.

A. I don't think so, no.

Q. Then, doctor, would you say that he has killed and will kill again?

A. Given the correct situation, circumstances, I think it would repeat more easily again, yes.

Mr. Collier: That is all.

The Court: Any redirect examination, Mr. Ryan?

Redirect examination by Mr. Ryan:

Q. Now, you attempted to describe, in answer to Mr. Collier, the urge that a party in the same mental condition that the defendant is here, would have with reference, say, to sexual intercourse. Now, will you distinguish for the jury

the difference between that urge and the normal person's urge, that urge and his urge and an animal's urge?

A. We have, all of us, a series of primitive instinct responses that are pretty strong urges, that is, appetites is another word used for it, that the individual follows on a primitive level. It seems to be an ingrained type of human response. By reason of the necessary customs of society that inhibit many of these things, he exercises foresight in it, whether we follow those. One of these chains started carries through almost automatically to a conclusion. Foresight is the leveling influence that we exercise socially to keep those things from happening where it is damaging to other people, and that was the thing that I was defining, that there are certain primitive things started that are [fol. 317] going to go on to completion in the individual that doesn't have foresight.

Q. Can you compare the way that would operate in an individual like Mr. Leland, the ordinary individual, and an animal?

A. The idea occurring, lack of censorship or foresight, and what the results might be; so it is carried through without regard for its effects, in the psychopathic type.

Q. How would that relate to the ordinary individual?

A. The average individual will begin to size it up and find out what might happen to him in the future and whether he is breaching the code of training that he is subject to, and that would have an inhibiting effect if it were out of order socially.

Q. And this inhibition would be a question of right and wrong?

A. Yes.

Q. What about an animal?

A. An animal will go ahead to a great deal more average extent, that is, the animal usually obeys his primitive impulse, because he doesn't have those last couple of layers of cerebral cords that goes with the exercise of judgment; so he follows his primitive pattern through on that basis; but it is an instinctual pattern that he follows according to these particular needs of the animal without regard to surroundings.

Q. Is that true about a psychopath?

A. Yes; only we are dealing with a more dangerous situation in the fact that he doesn't usually experience fear to any great extent; so their reactions are more uninhibited than those of the animal.

Q. You have talked about symbols, stimuli, that would affect a person in this condition. I don't think the jury is [fol. 318] fully aware of the meaning of those terms. Will you elucidate a little?

A. Using the word "symbol" or "stimuli" is something that—they start a chain. If we see meat, we start salivating and are ready to eat. The same thing ensues in respect to sex: The sight of a possible outlet would start a chain of responses in the individual and lead to the culmination unless it was inhibited.

Q. Could danger or fear do the same thing?

A. Danger will give a sudden protective response, I think, primitively, in any animal, and the human being as well.

Q. A person in this condition, is his appetite any different, as far as eating is concerned?

A. Erratic, usually, and much more impulsive in character than in the average.

Q. It wouldn't have anything to do with the quantity of it?

A. No.

Q. Mr. Collier read from a fragment of this statement. I am going to read something here and ask you to comment on it and explain to the jury, with reference to the examination you made of the defendant and the facts you discovered in the investigation——

Mr. Collier: This doesn't appear to be proper redirect. It should have gone before.

The Court: Anyway, you may proceed. I will overrule the objection.

Mr. Ryan: Q. (continuing) Page 41 (reading)—"Captain Browne: Q. What was your reason for wanting to kill her? A. Because, I had no reason at first. Q. Well, when you killed her, what made you make your decision that you should kill her? A. It just come to me (snapping fingers), [fol. 319] just the second she started screaming." Now, I might say it states in the deposition here that he snapped

his fingers. (Continuing reading)—"Q. Yes, but you said you previously had picked up this bar in case she started screaming. A. Just to knock her out. Q. Just to knock her out? A. That is right. Q. But you picked up the bar with the intention of using it if she started to scream? A. If I couldn't quiet her anyway. Q. Did you make any other attempt? A. When she started to scream? Q. Yes. A. No, I didn't make any other attempt. Q. You had the bar for that purpose. When you awakened and she was twenty feet away, was she walking back? A. No. Q. Did you call her back? A. I told her she had better come back. Q. You told her she had better come back, and then did you pick up that bar of steel then? A. Not at that time, not till later. Q. What was the reason why you didn't want her to scream or to leave you? A. Because I wanted to wait until that night. Q. Why? A. I would go with her. Q. You didn't want to be seen, did you? A. That is right. Q. Well, if you had permitted her to go home you wouldn't have had to go with her necessarily, would you? A. Well, I would have had to leave the vicinity. Q. Did she say she was going to tell her mother or the police? A. She was bound to. Q. Was that the reason you killed her? A. No; as I stated a little while ago, the reason I killed her was because she started screaming, I had no intention of killing her originally." Now, what—does that aid you in the pattern?

A. You want my reaction to that?

Q. Yes.

A. That he was caught in a dilemma or situation that he couldn't get out of, just as he was when the captain ques- [fol. 320] tioned him. The impulse began at the time he was answering the question. I feel the same thing would obtain in this individual under the stress that would lead to the sudden blowout by violence in the situation.

Q. What would the effect of recalling events to your mind, to a psychopath's mind, be? How would that be affected by his disability or condition?

A. You mean when they were questioning him about events that morning and about death to other people? They are pretty placid about the whole deal. They will be a little cagey, but they don't show the emotional reaction.

Q. How about his ability to remember events?

A. I don't feel there is any impairment of memory in this case.

Q. Well, now, if there were two or three different versions given of an event and the manner in which it happened, what is the significance of that?

A. Very often in these individuals, they will get so involved by their reaction that it is hard to remember which was which in the story.

Q. How do they start out in the beginning? Do they follow the thing through or answer question by question?

A. The tendency to reply when questioned would be much more the accepted thing in that type of pattern.

Mr. Ryan: I think that is all.

Recross-examination.

By Mr. Collier:

Q. Doctor, I will be glad when we get through with all the airplanes and fire engines, so we can talk. I will reread a part of what Mr. Ryan read: "Q. Yes, but you said you previously had picked up this bar in case she started [fol. 321] screaming? A. Just to knock her out." Doesn't that indicate a plan, that he picked up the bar for a certain purpose, to knock her out? Doesn't that indicate a plan?

A. As you have outlined the situation, as near as I can gather and from what Mr. Ryan read, that the girl was starting to leave and he was casting around to find out what to do about it then.

Q. How to get out of the dilemma?

A. That is right.

Q. You still haven't answered the question, doctor. My question is, doesn't that question and answer which he read clearly show that he had a plan?

A. No, I don't think so. I felt he acted on impulse. He was casting around what to do and the impulse came up. That was pretty obvious to me in questioning him. I don't see any variation in it, in the question.

Q. He picked up the bar for the purpose of knocking her out. He did an act with a purpose in mind to accomplish a certain end. Doesn't that show——

Mr. Ryan: You are asking as to the truth of the answer.

Mr. Collier: No, that is his statement.

Mr. Ryan: You are asking him as to the truth of the answer.

The Court: He may ask the doctor on the basis of the statement, and that he has done. What you are reading appears in one of the statements signed by the defendant.

Mr. Collier: Q. Again, doctor, doesn't that clearly indicate an ability to form a plan, regardless of how short a time it covered?

A. No. I don't feel that that document, as you read it, [fol. 322] indicates planning. I think it indicates an involvement in a dilemma and casting about for any way, without any direct planning, and then acting on impulse. The whole thing reads like that and his explanation sounded that way to me.

Q. He had a thought concerning the matter and acted on it?

A. Most assuredly he had a thought and most assuredly he acted on it——

Mr. Collier: That is all.

The Witness: —but that wasn't planning.

Mr. Collier: That is all.

Further redirect examination by Mr. Ryan:

Q. Would the fact that he was in danger at the time he hit the girl over the head have any relation to his act?

A. There is a primitive tendency to strike out in defense, regardless, that doesn't require planning.

Mr. Collier: I can't hear you.

The Witness: A primitive tendency to strike out doesn't necessitate planning.

Mr. Ryan: Q. Would that explain the act?

A. Yes. And that is the thing that makes these things so dangerous. They occur without order. And here is a situation where this type individual has been subject to that type of behavior for many years.

Q. Would the fact that he was in danger at the time this

statement was taken, would that have anything to do with the manner in which he answered questions?

A. Well, they are surprisingly smooth under that, but they will act on the impulse to try to avoid the situation [fol. 323] under pressure, and you can see a little tendency to hesitate around and avoid the issue.

Q. Is there any significance to the fact he made several statements?

A. Well, I don't imagine any two would completely compare because they are made more on impulse.

Mr. Ryan: That is all.

Further recross examination by Mr. Collier:

Q. The danger, then, would be the motive for the murder?

A. The danger would be the motif.

Mr. Collier: That is all.

Mr. Ryan: I object to that and ask that it be stricken.

The Court: I will overrule the objection and deny the motion to strike. That is all.

Witness excused.

The Court: Ladies and Gentlemen of the Jury: I don't want to work you too hard. I appreciate the responsibility that is yours and the effort to discharge it. Tomorrow morning, of course, is Saturday and it is my present wish to hold court tomorrow morning and tomorrow afternoon, unless you prefer not to do so. When you retire to the jury room I wish you would talk it over among yourselves, and if you don't desire to have court held Saturday afternoon, let Mr. Graham know and he in turn will communicate that fact to me. Sunday, of course, no court will be in session. I wish, as I say, to consider your best interests, and will appreciate your giving it real consideration when you retire. Ten minute recess. Will you remain seated until the jurors——

[fol. 324] Mr. Ryan: I would like to ask Dr. Dixon one question.

DR. HENRY H. DIXON, a witness on behalf of the defendant, was recalled and, having been previously sworn, further testified as follows:

Further redirect examination by Mr. Ryan:

Q. What did you mean by "motif" in your answer you just gave?

A. The term and definition made would mean the thing that would bring the thing into action or fulminate—motif, not as a design but the motif for the starting impulse.

Q. Motif. How would that relate to stimuli or impulse?

A. As near as I can gather, her attempt to suddenly depart the situation or get away was the thing preceding his sudden panic here.

Q. What is the distinction between this "motif" rather than "motive" and impulse or stimulus?

A. To me, I was using it as I defined the term "symbol," the idea of a starting situation that suddenly fulminated into action.

Mr. Ryan: That is all.

Further recross examination by Mr. Collier:

Q. Regardless of what you call it, it would be the reason?

A. There is always some good reason to support things.

Mr. Collier: That is all.

Witness excused.

The Court: Ten minute recess.

(A short recess was taken, after which proceedings were resumed, as follows.)

The Court: Next witness.

[fol. 325] Mr. Carskadon: If your Honor please, at this time the State has one witness which we have called from out of town and it is absolutely necessary that we hear this witness today because he has to go to Southern Oregon and will be gone one week under subpoena down there. At this time I would like to request—counsel for the defendant has agreed that we may call this witness out of turn and at this time I would like to ask permission of the court to call this witness out of turn.

The Court: You may call him.

[fol. 326] DR. BENJAMIN F. WILLIAMS called as a witness on behalf of the State of Oregon, having been first duly sworn, testified as follows:

Direct examination by Mr. Carskadon:

Q. Doctor, the acoustics in this room are very bad and if there is any noise at all it is impossible for these ladies on the end to hear; so will you please keep your voice up so we all can hear you? Now, then, what is your full name?

A. Benjamin F. Williams.

Q. Where do you reside?

A. Salem, Oregon.

Q. And what is your profession or occupation?

A. I am in the field of medicine, in the special division of psychiatry.

Q. And how long have you practiced psychiatry, doctor?

A. About 38 years.

Q. And where did you receive your training in that field, in psychiatry?

A. Well, it has been in a number of places. My longest period of training was in London, England, and various shorter courses throughout the United States.

Q. Are you a member of any psychiatric organizations?

A. I am.

Q. And what are those organizations?

A. The American Psychiatric Association.

Q. Now, doctor, are you licensed——

A. I am.

[fol. 327] Q. ——by the State of Oregon to practice medicine and psychiatry?

A. I am. Not to practice psychiatry. I am licensed to practice psychiatry by the national board. I practice medicine in Oregon, yes.

Q. Are you employed by any private individual at this time?

A. I am not.

Q. And were you?

A. I was.

Q. By whom?

A. State of Oregon.

Q. In what capacity?

A. In psychiatry, at the Oregon State Hospital.

Q. How long did you——

A. From July '39 to July '48.

Q. And you were with the Oregon State Hospital in 1944?

A. I was.

Q. At that time, doctor, did you have any opportunity to examine Morris Leland?

A. I did.

Q. Do you see Morris Leland in the court room at the present time?

A. Yes, I recognize him.

Q. He is sitting here with his counsel?

A. Yes.

Q. And that is the same boy you examined?

A. I think so.

Q. Now, doctor, how long did you have him under your observation?

A. I can't give you the dates. I have the dates in an abstract from my notes, if I may refer to them.

[fol. 328] The Court: You may do so, doctor.

The Witness: Pardon?

The Court: You may do so.

The Witness: From February 18th to April 24th, '44.

Mr. Carskadon: Q. Did you make any examination of the defendant during that time?

A. Yes; the routine examination that we make of all patients that are received at the hospital committed to us as psychiatric patients, or mental patients.

Q. This patient was sent to the hospital?

A. This patient was sent to the hospital by a court order, for observation.

Q. Was your observation upon more or less a daily basis?

A. Practically so, yes.

Q. And after your examination of this young man over that period of time, did you come to any definite conclusion as to his condition?

A. With reference to his mental state?

Q. Yes.

A. Yes.

Q. Would you tell the court and jury what that was?

A. Well, we are usually—may I explain what I am going to say about this: We concluded that he was a psychopathic personality, strongly criminal in his tendencies, and not psychotic.

Q. And putting that in general parlance so that the jury and myself, at least, can understand you, what is the meaning of that?

A. A group of patients that I think Dr. Dixon on the stand pretty well described; I would agree with that; per-
[fol. 329] sonality disorders that constitute a group who are neither psychotic nor neurotic.

Q. By that you mean what?

A. By psychotic I mean suffering from manic mental disorder, as it is termed legally; and by neurotic I mean suffering from any of the functional disorders that we call neurosis, and is committed to the hospital for observation to rule out the existence of psychoses or neuroses. Now, that, in a general way, describes the group. To say that he had criminal tendency, after having identified him as a psychopathic personality. We were impressed, through his record and by conduct, of his strong tendency to criminal acts. That he was not psychotic, was the conclusion of the staff of the hospital.

Q. How many doctors sat in on that, doctor?

A. I don't have the record of the number. It would be in the staff notes. Probably, oh,—I don't have them with me—oh, I suppose perhaps four or five.

Q. There was more than yourself?

A. The staff was very much depleted at that time. It was during the war and we were running on a very low schedule.

Q. It is more than your own opinion?

A. Oh, yes. It is the entire staff of the hospital.

Q. A person falling in that social group, would they be able to carry on their ordinary daily life without any trouble.

A. No; not able to carry on their ordinary daily life without any trouble. That characterizes them. They are in trouble constantly.

Q. They are in trouble constantly?

A. Yes.

[fol. 330] Q. Do they know when they are getting in this trouble?

A. Well, I think,—my answer would be yes.

Q. All right. Do you wish to explain to the jury how you arrive at that conclusion?

A. Yes. I think that they choose their conduct by a process of planning in the conscious; have a goal. It is true the goal changes frequently, vacillating, but they are capable of planning by conscious processes; differing from the psychotic patient whose planning contains many of the elements of the unconscious. Does that answer it?

Q. Yes, it does, doctor. Now, then——

Mr. Ryan: If the court please, if he is going to read out of that exhibit at this time on direct examination, I object. The only way I would agree to allow that to be done would be to read the whole thing. I don't think it is proper to, and that is why I did it on cross-examination on that. It might have been proper cross-examination, but not direct examination. If he wants to read the whole thing, I still don't think it is proper, but at the same time I'll permit it, but I don't want him to read a part of it.

The Court: Both of you gentlemen have a right to call the doctor's attention to any prior conduct, or statement that is made, in writing or orally, in connection with the examination, direct or cross. I can't at this time ask him to read the entire transcript of testimony; but you certainly have the privilege of calling the doctor's attention on cross-examination to any unread portions that you think are pertinent to the cross-examination. All right.

Mr. Carskadon:

Q. Page 28: I want to read to you, doctor, a portion of Morris Leland's statement made by him to Mr. Collier [fol. 331] by—transcribed by a court reporter at the police station, beginning at the bottom of Page 28: "Q. Well, did you pick the piece of steel up to use it on her if necessary? I believe you said you did. A. No, not unless I decided to kill her. Q. And then you did feel that you might use that piece of steel to kill her with? A. No, not to kill her with, to knock her out with. I didn't need this steel as long as I had the knife to kill her with. Q. I see. A. If I decided to kill her. Q. That is, you did think of the possibility that

you might kill her? A. Yes, I did. I did Friday night. Q. And now, Saturday morning, you woke up and she wasn't right at the spot that you were? A. That is right. Q. And she was, you said, about twenty feet away? A. That is right. Q. And you thought that she was going to run away? A. She would have if I hadn't of woke up. Q. And did you say anything to her? A. Told her to come back. Q. And what did she do, did she come back? A. She came back." Now, from that, doctor, could you say whether or not a person of a psychopathic personality such as you have described Morris Leland to have, and such as the doctor on the stand previous to you diagnosed his case, would you say that that was conscious planning, as you have described it previously?

A. Yes; I would regard that as conscious planning.

Q. And that is in the general pattern of psychopathic cases of this type?

A. Well, it might be in the general pattern of the cases. Not all psychopathic personalities are criminal.

Q. That is correct.

A. Yes.

[fol. 332] Q. But your diagnosis of this individual was with criminal tendencies, I believe?

A. Yes.

Q. Now, then, doctor, reading again from Page 30: "Q. And what did you do? A. Nothing. I just told her to stay over there awhile because I was about to wind her off. Q. You said what? A. About to wind her off. Q. How long after did you hit her with a piece of steel? A. About forty-five minutes later." By that, doctor, is it possible for you to say whether or not Morris Leland was at that time planning or deliberating upon any plan of his?

A. The same question as before,—of conscious planning?

Q. Yes.

(The question was read.)

A. Yes, it is conscious planning.

Mr. Ryan: Just a minute, your Honor. I feel this is invading the province of the jury. I don't think it is proper for him to answer that question. If it is a question of his

ability to plan, that is different; but to say "Was he planning, was he deliberating," is an invasion of the province of the jury and is improper, and I cite the court to Layman v. Knott, which states that the particular question that the jury is to decide is not to be testified to by an expert witness.

Mr. Carskadon: I think counsel may be correct. We will withdraw the question.

Mr. Ryan: Then I am still calling attention to that evidence and I ask for a mistrial, because he started the answer to that, and I think on the authority of Layman v. Knott it is prejudicial and I feel that it has—the question was brought up before in the other question; it isn't something new.

[fol. 338] The Court: The other question, you mean to the other witness?

Mr. Ryan: That is right.

The Court: You have a perfect right to inquire on cross-examination as the District Attorney did at that time. The Layman-Knott case involved direct examination of the witness, as in this instance. The District Attorney has withdrawn his question. I will instruct the jury to disregard the question and any portion of the answer that may have been given; I will strike that from the record and the District Attorney will reframe his question.

Mr. Carskadon:

Q. Considering what I just read, doctor, would it be your opinion that he had the ability to plan it and carry it out, that is, the conscious planning that you referred to previously?

A. I am a little mystified as to what you mean by that question. Do you mean did he have the ability to plan consciously?

Q. Yes.

A. My answer to that is yes, I think he had the ability to plan consciously.

Q. Now, doctor, in your examination of this patient and other patients in this same—or your examination, pardon me, I will withdraw that—in your examination of this

patient, could you say whether or not he had the ability to premeditate, deliberate and carry out any conscious plans?

Mr. Ryan: If the court please, that has nothing to do with this particular fact. The question—that is several years before this act happened and I don't see where his answer to that would have any bearing on his condition at [fol. 334] the time of the commission of the crime.

Mr. Carskadon: This is a specialist on the stand and Dr. Dixon testified that he was the same pattern of patient that this doctor has; and, plus that, that his condition was the same and wouldn't change in the future.

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

The Witness: At the time I knew him, yes, he had that capacity.

The Court: State when that was, again.

The Witness: 1944.

Mr. Carskadon:

Q. And, doctor, was his personality pattern at that time you examined him, in your estimation, subject to any change?

A. You mean did I have an idea that it would change?

Q. That is correct.

A. The prognosis is very poor in those cases, all of them, and I saw no difference in this case from the average psychopathic personality.

Q. Doctor, could a person of a psychopathic personality such as you have described Morris Leland to have in 1944 distinguish his acts and—pardon me—and as Dr. Dixon described the defendant to have at the present time——

Mr. Ryan (Interrupting): I object to that. That isn't a proper hypothetical question.

The Court: That is true. I will sustain the objection.

Mr. Carskadon:

Q. Can you say whether or not, doctor, that at the time [fol. 335] you examined Morris Leland, that he could distinguish the difference between right and wrong?

A. Intellectually, yes, he knew the difference between right and wrong.

Mr. Carskadon: That is all.

Cross-examination.

By Mr. Ryan:

Q. Doctor, are you a member of the American Board of Psychiatrists?

A. Yes.

Q. Do you remember Morris Leland particularly?

A. I remember him through association with the record and seeing him. By "particularly," if you mean remember all about him, no, I don't.

Q. What I am trying to get at is, I realize any professional man examines a lot of people, and I suppose you do more than the average. Can you remember the details of his case?

A. Only roughly; that he was—you mean as to why he was committed to us?

Q. Yes.

A. He was committed to us on a court order on a charge of having raped some one in a Park, in Portland. I think that was the specific charge. There were other things mentioned in his history, stealing automobiles, and numerous things of that sort.

Q. A person that is committed to your organization down there, not by a criminal court, as I understand it——

A. (Interrupting:) You mean routinely?

Q. Well, in any manner.

A. They may be committed by a court for observation.

Q. I know; but you said on a charge of rape. That wasn't [fol. 336] the reason they committed him?

A. He was sent for observation, but that was the reason he was in custody by the court.

Q. Was he committed because he was psychotic?

A. No, no; he was committed for observation to determine if he was a psychotic.

Q. How could they hold him down there in the State Hospital unless he was committed because he had a mental condition?

A. We didn't at all, any longer than it took us to determine that he was not psychotic, and then we reported to the court.

Q. It took from February 18th to what day in April?

A. To April 24th.

Q. That was approximately 60 days?

A. Yes, about.

Q. A little better than 60 days?

A. Yes.

Q. The order that committed him to the State Hospital, did it declare him psychotic as far as the court was concerned?

A. There was some testimony submitted in the hearing by Dr. Haskins, as I recall it, who regarded him as not competent, and that was the reason that he was committed to the hospital, to determine that question of his competency.

Q. Isn't it true, doctor, that he was committed to the hospital by virtue of the order that he was not competent, that he was mentally defective?

Mr. Collier: Just a minute, if your Honor please. That is a matter of record in this court house.

The Court: That is what I was going to suggest. The [fol. 337] doctor has testified as to the reasons for commitment as he recalls them; committed for observation because of a rape charge. If you know, doctor, I think you may answer. If you have any doubt or don't know, say so, and the records are available for us, for either one of you.

The Witness: Can I answer it as I remember it?

The Court: Yes; your best recollection, if your memory is sufficiently accurate to give a real opinion.

The Witness: I think I can, because I recall I had some correspondence with the committing court, who was anxious to know if we regarded him as psychotic or competent; a number of letters.

Mr. Ryan:

Q. There was considerable question in their mind?

A. Yes. And for that reason I took him before the staff for a united staff opinion; and we received that, and when I received that I notified the court; and then they recalled the patient from the hospital back to Multnomah County.

Q. Well, now, this was during the war, wasn't it?

A. Yes; it was during the war.

Q. How was the—what was the condition of the state mental hospital with regard to the number of patients down there?

A. Fearfully crowded, understaffed.

Q. You are still that way, to a certain extent?

A. I am not at the hospital now. I think that has been relieved to some extent.

Q. Did you have enough doctors to handle the situation?

A. No.

Q. If there was any doubt, then, you let the patient go?

[fol. 338] A. I didn't hear that question.

Q. If there was any doubt, then, you let the patient go?

A. If there was any doubt?

Q. As to whether he should be down there.

A. No, no, no; we were acting upon our best judgment. Our best judgment was that he was not a fit subject for the mental hospital because he was not psychotic.

Q. Now, doctor, in answer to the question of whether he knew right from wrong, you said intellectually. Will you explain what you mean? Does he know right from wrong in every way?

A. I can't answer that much better than I did, and if by intellectual—do you want me to explain that distinction?

Q. Is there any difference between intellectually and, say, morally, or by instinct?

A. Your answer is, Is there any difference? Of course, we do things through the intellect. But the emotional response is the important thing, and these patients know as between right and wrong, but they seem not to possess that quality that makes them or causes them to abhor certain things that the normal individual will abhor. That is an emotional thing.

Q. It, being emotional, it still has its seat in the mind?

A. It has—it is a part of the mind, but these patients don't respond as a normal individual does, because they will repeat the offense over and over again. They seem not to profit by experience.

Q. That is a disease of the mind?

A. No; it is a personality disorder and not a mental disease.

[fol. 339] Q. Are you acquainted with this text called "Visual Outline of Psychiatry, published by the Oxford Medical Outline Series, and the author is Leland E. Hinsie, M. D., Professor of Psychiatry, College of Physicians and Surgeons, Columbia University, New York; Assistant Director New York State Psychiatric Institute and Hospital"?

A. I haven't seen that specific issue but I know Hinsie very well and know a lot of his work.

Q. You consider him an authority?

A. Very much so.

Q. I will read a part of the text: Definition of psychopathic personality: "In American psychiatry this term," referring to psychopathic personality, "designates a nosologic or disease entity . . .". Now, doctor, can you explain to the jury the meaning of the term "nosologic"?

A. It means a group of individuals named so because they are diseased individuals.

Q. —". . . characterized in the main by anti-social impulses and acts, such as lying, stealing, injuring, arson, etc. An individual with psychopathic personality may have episodes of a true psychiatric nature, such as manic-depressive attack, a schizophrenic syndrome, or, less frequently, a psychoneurotic syndrome." Do you agree with that?

A. Absolutely.

Q. Then would you say, then, doctor, that this psychopathic personality is a disease——

A. (Interrupting:) Well, disease,—no. He has—it may [fol. 340] be characterized—there may be episodes of that sort.

Q. No; in order that we be clear I will read this definition again, and if you want to distinguish it, then we will do it——

Mr. Collier: I propose that the doctor see the book.

Mr. Ryan: He is certainly free to see the book.

The Court: All right.

Mr. Carskadon: Let him read it.

The Court: Read aloud the passage that you are asking him to express an opinion on, as to whether he agrees or not.

Mr. Ryan: This (indicating) is it. It starts here and this is the definition of a psychopathic personality.

The Witness: Here is the paragraph in question——

Mr. Ryan: No, pardon me; begin up here (indicating).

The Witness: The paragraph that we are discussing is this: "An individual with psychopathic personality may have episodes of a true psychiatric character or nature, such as,"—what I said—"such as manic-depressive attack, a schizophenic syndrome, or, less frequently, a psychoneurotic syndrome." I have seen it many times.

Mr. Ryan:

Q. I call your attention again to the fore part of that, where it starts here (indicating).

A. "In American psychiatry this term designates a nosologic or disease entity, characterized in the main by antisocial impulses and acts, such as lying, stealing, injuring, arson, etc." That is in harmony with every definition of it.

Q. Now, then, doctor, you do agree, then, that this psychopathic personality, without the episodes of psychosis, is still a disease?

A. In the sense, yes, in the sense that we use that term [fol. 341] for disease of personality or mind.

Q. What is the difference between personality and mind?

A. Yes.

Q. Is there any?

A. Oh, yes.

Q. Isn't the personality affected by the mind?

A. Yes, certainly, by the mind; but the conduct of the individual may be without regard to any real mental disease.

Q. Well, now, doctor, this is the definition that is used in this book, isn't that right?

A. That is right.

Q. There isn't any qualification of the definition. This is the complete statement of the definition.

A. Yes. I think it is a good definition.

Q. And you would say that that would define a psychopathic personality?

A. That is right.

Q. Doctor, here is a brand new text, I think it is just off

the press. The name of this text is "Practical Clinical Psychiatry," and it is by Edward A. Strecker, A. B., A. M., Sc. D. and several other degrees. He is Professor of Psychiatry at the School of Medicine, University of Pennsylvania; and by Franklin G. Ebaugh, Professor of Psychiatry in the University of Colorado, School of Medicine, Director of the Colorado Psychopathic Hospital; and Jack R. Ewalt, Professor of Neuro-Psychiatry; Director Galveston State Psychopathic Hospital, University of Texas Medical Branch; the section on Psychopathic Problems of Childhood, by—no, I'll show you this title page. Are you familiar with that text?

[fol. 342] A. Yes.

Q. All right. Now, let me get this and I'll let you see it: "Psychoses with Psychopathic Personality. The basis of these mental disorders is so-called psychopathic inferiority, which, in itself, however, is not a psychosis. In a strict sense psychopathic personality is a constitutional reaction, a kind of feeble-mindedness other than intellectual in which there is commonly defective emotional control and a lack of inhibition in the volitional sphere. The record of the inferior is clearly written in his inadequate response to ordinary life situations. Many criminals, moral delinquents, tramps, sexual perverts, drug addicts, etc., belong in this category. The pathologic personality may be the background for episodic psychotic attacks of irritability, excitement, depression, paranoid outbreaks, transient confused states, prison psychoses, etc." Is that a true statement?

A. Yes, that is in harmony with Hinsie's statement, absolutely.

Q. Do you want to read that?

A. Oh, not necessarily. I think I know what it is.

Q. Now, what do they mean by "control and a lack of inhibition in the volitional sphere"?

A. Control and lack of——

Q. Lack of inhibition in the volitional sphere.

A. A lack of ability to control their movements, their acts.

Q. The "volitional" refers to will power?

A. Well, that is one term for it, yes.

Q. In other words, that means that they have—they lack that control?

[fol. 343] A. "Volition" means the act, the act itself, rather than will power, and I object to the term "will power." Yes, they fail to control their act. Their history tells that.

Q. Would you say that it would make it difficult for a person suffering from this disease of psychopathic personality, to do something purposely?

A. I think most,—my answer is no, it wouldn't.

Q. Is purposefulness, does that call to mind volition?

A. No. Volition is a part of the elements of purposefulness. Volition is the technique, the mechanism, by which he directs his effort to that end.

Q. Isn't volition from the same root word as "voluntary"?

A. Probably so, yes.

Q. And that "voluntary" expresses the mental process of forming a purpose. You either form a purpose or you do something without purpose or will power?

A. Well, the distinction that you are attempting to make, I can't make, because I use the term "volition" without reference to the act. It is the mechanism that prompts him to act in a certain direction; the goal idea. That is the technique of it.

Q. Well, do you agree, doctor, that it is possible, and probable, that a person suffering from a psychopathic personality, constituting a psychopath, to have what we call episodic psychotic attacks?

A. Yes, it is.

Q. And that is a probable situation?

A. What?

Q. That is probable?

[fol. 344] A. Not probable; it occurs. Anyone can develop a psychosis, a psychopathic personality, mental deficiency, in a normal individual.

Q. Well, "the psychopathic personality may be the background for episodic psychotic attacks of irritability, excitement, depression, paranoid outbreaks, transient confused states, prison psychoses, etc." Do you agree with that statement?

A. No, not entirely; because that might mislead us. I would say it would be better to say that that would confuse

us with the idea of the cause of the disorder, which it has nothing to do with. It isn't the cause of it. They may develop depressive psychosis and when they do, they have certain coloring or tincture from the personality. But the fact that a person has a psychopathic personality does not mean that he necessarily must become psychotic.

Q. But that is part of it; it could follow into that, is that right?

A. He could develop a psychosis, as anyone could. If he did, it would be colored by his personality.

Q. That is included in here for the purpose of calling attention to the fact that that is something that goes along with this thing at times?

A. That when you encounter a psychosis, that you want to keep in mind the fact that the personality influences the conduct of the individual that has a psychopathic personality, and should be evaluated.

Q. I want to get this clear: I refer back to this statement in this—I just read—that "in a strict sense psychopathic [fol. 345] personality is a constitutional reaction, a kind of feeblemindedness other than intellectual in which there is commonly defective emotional control,"——

A. Yes.

Q. —". . . and a lack of inhibition in the volitional sphere." Now, I have a dictionary here in which the term "volition" is defined. Do you take issue with this definition: "Volition: The power of willing; any exercise of will. The faculty of will by which the powers are directed toward the attainment of a chosen end;"——

A. Yes.

Q. That would be planning and doing, both, wouldn't it?—"That which is specifically willed or determined upon."

A. You may use the word "will," but I would use the word "attracted," the mechanism that attracts him toward that goal.

Q. This says "The faculty of will by which the powers are directed toward the attainment of a chosen end."

A. Well, if you want to choose that word, that is all right.

Q. I hand you this dictionary and if you can see any other definition——

A. I am in harmony with that definition. It is the voli-

tional involvement, but it does not imply that intellectually he is not able to distinguish. That is the point I make.

Q. Isn't the will a part of the intellect?

A. Well, without intellect we probably wouldn't have any will to do things. It is a part of it, yes, to an extent. It isn't the major part of it.

Q. We come here to a situation where we can go into the [fol. 346] argument that is taken up in——

Mr. Carskadon: I object to that question he is asking.

The Court: I am not going back that far either, myself. I think you have pursued this particular line of inquiry far enough.

Mr. Ryan: If the court please, I still—here I have read him the dictionary definition and then he still says it doesn't have anything to do with the will power.

The Court: He has a right to disagree with the dictionary if he wants to. You have a right to cross examine the doctor with reference to his ground of disagreement with any established medical work with which he is familiar, and that you have done. If you wish to pursue that, go ahead; but I am not going into Webster.

Mr. Ryan:

Q. What did you do for this young man down there?

A. In a medical way?

Q. Yes.

A. I couldn't answer that because I don't have the history of treatment. I don't know whether much was done. Our purpose was to diagnose him, chiefly.

Q. He was a dangerous person, from your diagnosis and investigation, is that right?

A. Dangerous to society, yes.

Q. Well, do you feel that a person in that—psychopathic personality should be turned loose on society?

Mr. Collier: Just a minute: That is asking——

The Court: Yes; that belief is beyond the inquiry here; his opinion would be of no interest to the jury. You may, of course, inquire into the condition of the defendant at the [fol. 347] time, as the doctor observed him.

Mr. Ryan:

Q. You stated, doctor, that at the time you made your examination the prognosis was poor. What did you mean by that?

A. That I identified him, that we identified him as a psychopathic personality and that he had a strong criminal trend, by the evidence of his past history. We suspected strongly that he was maneuvering himself into a position to gain protection from some of his deeds. We didn't feel that he was a fit subject for psychotic treatment in the hospital and referred him back to the court with the thought that he could stand trial. And our prognosis of permanent recovery is poor in all of those, and it was in his case.

Q. How old was he at that time?

A. I don't remember.

Q. That was in 1944?

A. '44.

Q. He is 22 now——

Mr. Garskadon: Seventeen years old.

The Witness: Probably.

Mr. Ryan:

Q. At that stage is there anything you can do to arrest further development of this condition?

A. Well, if we knew the cause of it we might answer yes; but we don't know. So there isn't anything—so we can't do anything. They might be improved by proper adjustment and handling and placing, but there is a lot of variation.

Q. But ordinarily it could, they could be?

A. The prognosis is poor.

Q. What about shock treatments?

[fol. 348] A. If the individual was suffering a psychotic episode, then one might resort to shock.

Q. By "psychotic episode" you mean——

A. One of these things you referred to, manic-depressive attack, schizophrenic syndrome.

Q. That is temporary?

A. Yes.

Q. A person may suffer that and then go along for some time and then have another?

A. That is right.

Q. And in the interim between, you couldn't tell?

A. The question was, would shock treatment be a benefit; is that it?

Q. Yes.

A. To a psychopathic personality?

Q. Yes.

A. No.

Q. By a psychotic episode, that is a temporary——

A. Yes.

Q. It happens at varying intervals?

A. Yes.

Q. In the interim could you tell whether or not he was suffering from a psychotic episode?

A. Between the episodes?

Q. Yes.

A. Well, yes; one ought to be able to.

Q. How?

A. By the absence of the symptoms of those psychotic episodes.

Q. Suppose a situation that you examined a psychopathic [fol. 349] personality during a period in which the only mental disease he was suffering from was this constitutional psychopathic state and not the psychotic episodes, now, at that time, by examining him at that time could you tell that he had had a psychotic episode in the past, or would have one in the future?

A. Your question is, that during the interim, he, not suffering from a psychosis at that time, could you tell that he had had psychoses?

Q. Yes.

A. Well, you might and you might not. I wouldn't feel that I could unless I had the history of it.

Q. Now, about the future?

A. With reference to psychotic attacks?

Q. Yes.

A. I don't think you can predict them.

Q. You couldn't?

A. No.

Q. He might have one isolated attack and he might have fifty?

A. That is right.

Q. Now, what brings on these attacks, psychotic attacks?

A. I don't know.

Q. Would fear, excitement or tension bring it on?

A. I don't know.

Q. Is there any answer to it?

A. No.

Q. You don't know?

A. No.

Q. And nobody knows?

[fol. 350] A. No.

Q. What is their duration?

A. Of an episode?

Q. Yes.

A. It varies; no fixed period.

Q. Could it be momentary?

A. Oh, hardly, no; it wouldn't be recognized momentarily.

Q. Could it last 15 or 20 minutes?

A. No, I think not. I have never seen such a case.

Q. A half a day?

A. I have never seen that.

Q. What is the shortest period you have ever seen one?

A. Just for the moment I recall about two or three weeks. I am speaking of manic-depressive.

Q. There are other types?

A. Yes.

Q. Do you know, would they last longer or shorter?

A. Other types of psychosis?

Q. Yes; paranoid and transient and confused states?

A. Oh, yes, they would all be of longer duration. Paranoid is simply a term that means like unto a true paranoia; it usually lasts longer.

Q. A psychopathic personality in a period of psychosis is extremely dangerous, is he not?

A. I don't know how to answer that. I have seen psychopathic personalities in psychosis that were not dangerous.

Q. As a general rule?

A. If the patient has criminal tendencies, why, yes; and

[fol. 351] under a psychosis he would be perhaps more dangerous.

Mr. Ryan: That is all.

Redirect examination.

By Mr. Carskadon:

Q. Doctor, after hearing all these texts counsel has read and your discussion with him, is there anything that has been read or said that is in conflict with your original opinion that Morris Leland has the ability to distinguish between right and wrong, and premeditate and deliberate?

Mr. Ryan: I object to that, your Honor; calling for a conclusion of the witness, which is going to be drawn by the jury, and it is improper.

The Court: I know; but we let Dr. Dixon testify along the same lines.

The Witness: I am basing that upon the time I knew him.

Mr. Carskadon:

Q. I mean has there been anything read or said in your cross examination by Mr. Ryan that would change your opinion?

Mr. Ryan: I object to that on the ground it isn't a proper hypothetical question. He is still their witness and the inquiry should be put on a proper hypothesis, including all the facts in the case.

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

The Witness:

A. The answer is no.

Mr. Carskadon:

Q. Then it is your opinion that as long as this man is alive he will be dangerous to society. Is that correct, or not?

[fol. 352] A. I think so.

Mr. Carskadon: That is all.

Mr. Ryan: I ask that be stricken. It is argumentative; very prejudicial.

The Court: Oh, he has answered it, and I think he has already said, in an answer to a similar question.

Mr. Carskadon: He went into it on cross examination.

The Court: Of course, he is your own witness.

Mr. Carskadon: They went into it on cross examination.

The Court: Well, he is your own witness. I will strike the last answer and the jury will disregard it.

Recross examination.

By Mr. Ryan:

Q. One more question: You are basing your conclusions in your testimony here on the only examination you had of him and that was in 1944?

A. Yes; and the record of it.

Q. That is right; and the record from the hospital?

A. Yes.

Q. Do you have the record from the hospital there, doctor?

A. Yes.

Q. I wonder if we could see it for a minute?

Mr. Collier: Just a moment, if your Honor please: The witness didn't refer to his—to that, as I understand it. He wants to get away and go back to his home in Salem immediately and he can't leave the record here. I realize he is under order of the court, but I mean——

The Court: Well, I have no objection. We are going to adjourn until tomorrow morning at 9:30, very shortly, and [fol. 353] I have no objection to Mr. Ryan looking over the record in the doctor's presence. Ladies and Gentlemen of the jury——

Mr. Carskadon: May I ask one question?

The Court: All right.

Mr. Carskadon:

Q. Your examination was from February 18, 1944, to April 22, 1944?

A. That is right.

Q. About two months' time?
A. Yes.

Mr. Carskadon: That is all.

Witness excused.

The Court: Ladies and Gentlemen, I appreciate the fact that the majority of you have expressed a willingness to serve tomorrow afternoon. However, I am inclined to throw in with the minority and to conclude this week's session tomorrow at noon. I imagine some of you will be pretty tired tomorrow afternoon. So that is the present plan. We will adjourn until tomorrow morning at 9:30.

(Thereupon court adjourned until November 5, 1949, 9:30 A. M., at which time proceedings were resumed, as follows:)

[fol. 354] November 5, 1949.

The Court: Call your next witness.

OFFER IN EVIDENCE

Mr. Ryan: At this time, your Honor, in order to save time, I want to offer in evidence Defense Exhibit 19 which is the army record of the defendant, the record while he was in the service. It is offered with the understanding that the Veterans Hospital can withdraw it at the close of this trial and there will be substituted photostatic copies.

Mr. Collier: We object to the record as being purely hearsay.

Mr. Ryan: The stipulation that Mr. Rydalch made in the presence of your Honor, Mr. Collier and myself, it was understood that he would not have to be here to testify.

Mr. Collier: That is true.

Mr. Ryan: These are records made in the regular course of business in the army and in the Veterans Administration, and they were in the custody and care of Mr. Rydalch, of the Veterans Bureau in Portland.

The Court: I am not prepared to rule upon it at this time. I haven't had an opportunity to look at the file. I don't know whether the District Attorney has examined it or not. Portions might be admissible and portions might

not be admissible. I would judge, if it is couched in any technical phraseology, that some portions of it might not be understood by the jury. So I wish to examine the file. I will reserve ruling upon the offer.

Mr. Ryan: If the question of language comes up, we would like to reserve the right to put on expert testimony. [fol. 355] to explain the language.

The Court: If, as and when the question arises, I will dispose of it.

[fol. 356] Maud Leland, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. Now, Mrs. Leland, I know you are nervous and I know possibly you may have difficulty speaking up, but it is necessary that the jury hear you. Now, you talk up so those last two women jurors—try to address your remarks to them. What is your name?

A. Maud Leland.

Q. You are the mother of the defendant here?

A. Yes.

Q. How old is the defendant?

A. He will be 23 the 26th of this month.

Q. He had an accident when he was very young?

A. Yes, he had an accident in 1933, August 29, 1933, and he was in the hospital twice. They had him there I think it was a couple of days, and then they took him home, and then he went back again on September 8th and was there until the 14th of September, 1933, and from that time on he didn't do right.

Q. Before he had this accident what kind of boy was he?

A. Well, he was all right, in my opinion. I didn't have any trouble with him. He seemed to act normal and be like other youngsters.

Q. Do you have any other children?

A. Yes, I do. I have six at home.

Q. And how did he act before the accident in comparison with the other children?

A. Well, he acted all right until, as I said, he had his [fol. 357] accident, and then I had a lot of trouble with him. He would get into difficulties, like when he started to school he would—he took one little boy and had put sand—buried him in the sand; and things like that. And we had trouble over that. And just little things that youngsters will do.

Q. You recall what happened to him in the accident?

A. Well, I understood that he had a brain concussion.

The Court: You have to just testify as to what you saw. Did you see the accident?

The Witness: No, I didn't.

The Court: You can testify as to the effect, if any, of the accident upon the boy, but you can't state what was told you by anyone else.

The Witness: No; I seen it after.

The Court: You saw him after?

The Witness: Yes, when he was still on the ground, when I looked out my window, and when I went downstairs and saw him on the ground. He was all white. He was unconscious.

Mr. Ryan:

Q. Did you go to the hospital with him?

A. No. My husband went.

Q. What injuries did he receive in the accident?

A. Concussion.

Q. What else?

A. Well, that is all I know.

Q. What type of personality did he have, and temperament did he have, before the accident?

A. Well, he was easy to get along with. He would do things that I would tell him to do.

[fol. 358] Q. Was he—was there any change in his personality afterwards?

A. Yes, there was; because when I would tell him to do things, he wouldn't do them. He would get snooty with me, and he had a violent temper. One time he got up to get some coffee and I didn't have any made. He took the coffee pot and threw it on the floor and started in cussing me.

Q. Give us any other indications of violent temper. Tell the jury what you told me.

A. Oh, yes. When he was home I would tell him "Now, don't go out at night," "Don't do this." And he would turn around and sass me or say "I'm going to do as I dog-gone please, and if I want to go out, I'm going to go out." Things like that.

Q. Before the accident how did he react with reference to being like the other children in playing and reading and things like that?

A. He never took much interest in the other youngsters. He hardly ever played with his own brothers and sisters. He would sit around the house——

Q. I am asking you before the accident.

A. Oh, before; well, he wasn't so awfully old before.

Q. What about after the accident?

A. Afterwards? That is what I am saying. He never played much with the other children. He stayed off to himself mostly. I don't know, he seemed to not ever want to go with any youngsters in the neighborhood, as far as that goes.

Q. How did he listen when you talked to him, when you were not angry with him?

A. Well, he would seem to listen when he wasn't angry, [fol. 359] and I wasn't angry, he would listen; but then at the same time he would turn around and do the opposite.

Q. Was that different from the other children, or the same?

A. Well, I would say it was different, myself; because the other children, I never had trouble like that.

Q. Did he confide in you?

A. No.

Q. Do you know what I mean by that?

A. Yes; if he would tell me things about himself, probably. No, he never did.

Q. Did he ever threaten you or do anything of that sort?

A. Yes.

Q. Tell the jury some of those times.

A. One time he had come home, he and his father had had some trouble, and he had come home, and I was kind of afraid of him myself, so I had the back door locked this night about 10:00 o'clock, and one of the boys said "Morris wants

to see you." I said "I'm not going to the door." And in his hand he had a knife and he had the point of it open and he was showing me that knife, and in his argument he said "Well, I'm going to get even with you." And on the back of the house he had wrote a note saying he was going to get even with the family because they wouldn't let him in.

Q. How old was he then?

A. Oh, that was about a year ago, I would say. He was about 21.

Q. Is there any other time that he ever threatened you or used physical violence upon you?

A. Yes. Around the house, when he would get mad at me [fol. 360] he would say "Well, I'm going"—well, I don't know how to put it; he would always say I'm going to do this or that with you.

Q. What did he say?

A. Well, he told me that one time he was going to get even with me because I wouldn't put up with his orneriness and things like that. He never said he was going to shoot, but there was always a knife; it was always a knife he had.

Q. Did he carry a knife?

A. Yes, all the time; and it was always open.

Q. Did he ever throw anything at you?

A. Yes. One time at home I remember. He had just got through listening to a radio program, and I came through the door—he had been drinking coffee—and he took this cup and threw it at me and hit me here (indicating). I still have the scar right there where he hit me with this cup.

Q. What was the radio program, do you know?

A. No, I don't remember, it has been so long ago.

Q. Did you say anything to him?

A. Yes, I did. I got after him for that.

Q. But before he threw the cup——

A. Yes. I had come in and asked him about going to the store. I wanted him to go to the store for me and he wasn't going to do it; he wanted his sister to go. And then that is when I came through the door and he threw this cup.

Q. Did he ever strike you?

A. Well, no; I can't truly say that Morris ever struck me, really.

Q. Did he ever attempt to?

A. Yes, he has attempted to, but he never did.

[fol. 361] Q. Tell the jury about that.

A. One time he grabbed me by the arm when I would go and say something to him, and he twisted my arm. He would say "Mom, I'm not going to do it. You hear me?" and things like that; but I would jerk away from him.

Q. Was this trouble—did you have this all the time or are these isolated instances? Tell the jury the frequency of these incidents.

A. What do you mean?

Q. When did you first start having these incidents where he threw things at you and grabbed your arm?

A. Let's see; he was about, I would say, 11 or 12 when I first started in having trouble with him. And then also he would sneak out at nights. He would—we would tell him not to go out, and he would go out anyway. Then he would come in after his Dad would go to work and then I would get after him about that. Well, then he would start in on me. I just don't know how to put it, but——

Q. When he had these spells, just tell how he acted and looked.

A. Well, he would get real mad. His eyes would get kind of slanting and get a sneer on. My own face—that's the way I would put it. He just looked like he would tear me to pieces, if he thought he could get away with it.

Q. Did you ever see anybody act like that before?

A. No. I have never been around anybody like that.

Q. Did he ever complain of headaches?

A. Yes. Morris has complained of an awful lot of headaches. He would always want to take aspirin or something; ask me if I had aspirin. He was always taking headache [fol. 362] pills. He always said his head hurt on top.

Q. What about Morris when he has been home lately? Does he sleep in a bed?

A. No.

Q. Tell the jury about that.

A. Well, when he was home the last time—we had two bunk beds; we have a room for the other boys. And we told Morris he could stay home and have one of these beds. And he slept in this bed, I think, one night; then he said "No, I'm not going to sleep in that bed; I'm going to sleep on the

floor by the heater. I can sleep all right." I said "Morris, that don't look right. People coming into the house,"— "Well, I don't care; I'm going to sleep on the floor." Then when we would go out, he would get up and go out. Then he would come in around three or four o'clock, and I would get up and he would still be on the floor. I couldn't get him to sleep in a bed; he just wouldn't do it.

Mr. Ryan: That is all.

Cross-examination.

By Mr. Collier:

Q. Mrs. Leland, these different occasions when he became angry at you, they were over real things rather than imaginary things, weren't they?

A. Well, yes. They weren't imaginary.

Q. And he exhibited quite some degree of——

A. Violence, I would say.

Q. Well, just a moment. He exhibited some degree of malice or hate towards you, is that right?

[fol. 363] A. That is right.

Mr. Collier: That is all. Thank you.

Redirect examination.

By Mr. Ryan:

Q. Did you ever see anybody act like that before?

Mr. Collier: Just a minute. That was answered.

The Court: She testified to that.

Mr. Ryan: That is all.

The Court: That is all.

Witness excused.

[fol. 364] Irma Ness, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pelay:

Q. Mrs. Ness, I am going to ask you at the outset if you will speak as clearly as you can, so the two ladies on the end——

A. I'll try to. I got such a cold.

Q. That is Mrs. Irma Ness?

A. Yes.

Q. Where do you live, Mrs. Ness?

A. 2249 Northwest Wilson.

Q. Mrs. Ness, were you ever acquainted with the defendant, Morris Leland?

A. Yes, I am.

Q. When did you first meet the defendant?

A. In 1929.

Q. And what was the circumstance of your meeting the defendant?

A. Well, we met—my boy used to play with the children when he was small.

Q. You lived in the same neighborhood?

A. Yes.

Q. You had children?

A. I got one son.

Q. How old was he then?

A. Five.

Q. How old was he at the time you knew the defendant?

A. I guess around close to eight or nine; I couldn't say for sure.

Q. And how old do you estimate the defendant to be at that time? Not exactly.

[fol. 365] A. I figure just about six.

Q. Just about six?

A. Yes.

Q. And your son was eight?

A. I think so.

Q. Did your son and the defendant and the defendant's family—what I am trying to get at is, in your own words

explain how you happen to know the defendant, and under what circumstances; just in your own words.

A. Well, my son, he used to play with the children when we lived in the neighborhood, but when the accident happened—we was living there but I didn't see it; we heard about it at the time—but at the time when they were playing, the children, he was in normal condition.

Q. That was before the accident?

A. Yes.

Q. And——

Mr. Carskadon: If your Honor please, we move to strike that, appeared to be in a normal condition. They haven't laid the proper foundation of a lay witness in regard to that.

Mr. Pelay: That is correct. That was volunteered. We will bring that out properly.

The Court: Well, I will strike from the record the statement that the child was normal at the time and the jury will disregard it.

Mr. Pelay:

Q. You recall the accident that the defendant was involved in, do you not? You mentioned an accident. Do [fol. 366] you remember it?

A. Yes. In 1933.

Q. You didn't see the accident?

A. No, I wasn't there.

Q. You merely heard about it?

A. Yes.

Q. Did you know the defendant before the accident?

A. I knew him before, yes, in 1929.

Q. Did you have occasion to see the defendant on occasion before the accident?

A. No; I never was much with the family then, until afterward, I got more acquainted with the family.

Q. I am talking about the boy himself now. Did you have an opportunity to observe the boy to any extent before the accident?

A. No.

Q. I see. Now, after the accident, you say, is when you

became acquainted with the defendant and his family. Is that correct?

A. Yes.

Q. And how frequently did you have an opportunity to observe the defendant at that time?

A. Well, we just—oh, off and on around there. I never did go up an awful lot at a time while I got acquainted with them. I stayed around. Just the children,—my boy played with them a lot, and that is all I could say.

Q. They played with him a lot at that time?

A. And with the children around there, yes.

Q. You observed them playing?

A. Yes.

[fol. 367] Q. How often would you say that you had an opportunity to observe them? I mean just generally. Would you say once or twice a week? Or just give me an idea of how many times you would see the defendant playing with your children.

A. Oh, I saw him when I would go by there towards the school or a little farther on. And then Leland would be playing in different places in the neighborhood.

Q. About how many times a week would that be?

A. Maybe once a week; maybe every other day. I can't say.

Q. That was over how long a period?

A. I don't get you. What do you mean by that?

Q. How long a time,—you say you saw him maybe once a week, maybe sometimes more. What I am trying to get at now is, over how long a period of time did you observe the boy from the time of your acquaintance? Was it six months, a year, two years? How long a time did you have an opportunity to know and observe the defendant?

A. Oh, I knew him, I—oh, I saw him pretty near once a week, maybe once a month. It depends how I have time to be around them.

Q. And that was commencing after the accident?

A. Yes.

Q. And for how long after the accident?

A. Oh, I go quite frequently, maybe once a week or maybe every two weeks; just when I got time to go and visit them, a little.

Q. Did you keep that up for a year, two years?

A. I been keeping that up all the time; still keeping it up. I see the family quite often, yes.

Q. From your observations of the defendant did you notice anything particular about the manner in which he [fol. 368] conducted himself?

Mr. Collier: Just a moment, please. I don't think a proper foundation is laid into the acquaintance with the person on trial.

The Court: Keep your voice up.

Mr. Collier: The testimony of a lay witness as to sanity or insanity must be founded upon——

The Court: She is asked now with reference to the boy's conduct. I will overrule the objection.

Mr. Pelay: Do you recall the question now?

The Court: Read the question.

(The question was read)

The Witness: Do you mean when he was injured?

Mr. Pelay:

Q. No; I mean after the time he was injured; and from your observation and your visiting, did you observe anything about the way he handled himself, the things he did? Do I make myself clear?

A. Yes. Well, when he did—he used to—I used to go over there lots of times and his parents used to want him to do something, and he don't seem to be in the mood to want to do anything. He just act like he kind of has a queer sneer to himself; I can't express—a sneering. It isn't a smile, it isn't a grin; I just can't say it. And his parents had a hard time. They used to come over there—one time—they wanted him to go to school. He never goes to school. His mother was at the phone while I was there to call up the truant officer, and things like that. And one time I happened to come in and his mother, she was sitting there, I asked her "What happened to you?" [fol. 369] "Oh," she said——

The Court: One minute. Are you testifying to what Mrs. Leland told you, Mrs. Ness?

The Witness: Yes.

The Court: You can't testify to that. What you saw and heard, you may testify to.

Mr. Pelay:

Q. Was the defendant there in the room at this time you are talking about?
A. About that story, that first——
Q. Yes.
A. Yes.
Q. Morris was there?
A. Yes.

The Court: Excuse me just a minute, gentlemen.

(Thereupon a short recess was taken, after which proceedings were resumed, as follows:)

The Court: Go ahead.

Mr. Pelay:

Q. You say the defendant was there at the time?
A. Yes.
Q. Would you tell, then, what occurred?
A. Well, then, after a while he just went out, he would pay no attention, he went out; and the rest of them, they played.
Q. What did she say at that time?
A. She just told him that he didn't want to go to school.
Q. What else did you observe about the defendant and the way he acted?
A. Well, he just never acted the same; he never wanted to play like he should.
[fol. 370] Q. Would he play with the other children?
A. Well, not very much. You can't say he really played at all. He is more by himself.
Q. By that you mean he would stand aside?
A. Kind of listen to some program or radio, or read some kind of a book, I don't know what.
Q. Did he seem to act as the other children acted?
A. No; he acts different; he don't act like a child would act.
Q. Why was he different?

A. Well, he hasn't got the life. He acts just like—oh, you could talk to him just like—nothing sinks into him. He acts dull, like he got no life to him at all, and just like talking to a wall or anything. He got no life to play. He, listen to some radio, or reading some kind of book; that is all he was doing. He wouldn't mind when the parents asked him.

Q. Now, this particular time you refer to was when you were visiting the Leland home. Is that correct?

A. Yes.

Q. How often would you visit the home?

A. Oh, I should say about once a month or once every two weeks.

Q. And for how many years did you visit the Lelands when the defendant was living at home with them?

A. Well, the last I was with them was in 1941, '42.

Q. What year was the first time you visited them after the accident, let's say?

A. I visited them right shortly afterward; I couldn't say; around that time.

Q. Would you say in 1933?

[fol. 371] A. Well, either that, or 1934 would be more possible.

Q. Would it be a fair statement to say that from 1933 or 1944, 1933—1934 to 1941——

A. Yes.

Q. —that you visited the Lelands?

A. Yes.

Q. And that you visited them once or twice a month?

A. Just about that, yes.

Q. Did you have an opportunity on these visits to observe the defendant?

A. At times I seen him, at times I didn't, yes.

Q. Would you say that you knew the defendant quite well?

A. Yes.

Q. Would you say that you knew him personally?

Q. Would the defendant, in addition to these visits, come and visit you at your home?

A. Yes.

Q. I mean the boy.

A. Yes.

Q. How often would that be?,

A. Not often; but several times he seen me when they were small; she brought the whole family.

Q. Now, I will ask you on the basis of your own personal observation of the defendant, what is your opinion in regard to his sanity?

The Court: Just a moment.

Mr. Carskadon: If your Honor please, we object to that [fol. 372] on the basis that this is a lay witness and no intimate acquaintanceship has been shown as required by the Code. Visits have only been——

The Court: What is the section of the Code?

(The objection was argued to the Court. Thereupon a recess was taken, after which proceedings were resumed, as follows)

Mr. Carskadon: We will withdraw that.

Mr. Pelay: I checked my question with Mr. Collier.

The Court: All right.

Mr. Carskadon: We will withdraw it.

The Court: Read the question.

(The question was read).

The Witness: Well, my opinion is, my opinion is that he is not normal in no way at all.

The Court: Now, Ladies and Gentlemen of the Jury: In evaluating expressions of opinion you are to take into consideration the opportunity of the witnesses to associate with or familiarize themselves with the condition of the individual concerning whom the opinion is expressed and you are to weigh and give credit to it based upon that opportunity, as well as all the other factors in the case. Next question.

Mr. Pelay: I ask the indulgence of the court. Could I have that last question and answer read?

The Court: Yes.

(The last question and answer were read).

Mr. Pelay: That is all.

[fol. 373] Cross examination.

By Mr. Collier:

Q. Mrs. Ness, over the period that you knew the defendant you have seen him to some bad things and some good things. Is that right?

A. Yes.

Q. And you, of course—it must be your opinion that he actually did know the difference between right and wrong, but disregarded it, isn't that right?

A. Well, he must have before the accident when he was——

Q. No——

Mr. Pelay: Let her answer the question.

The Court: It isn't responsive. Read the question, and you may answer the question and then explain any answer you wish. Read the question, Mr. Reporter.

(The question was read).

The Witness: A. Yes.

The Court: Now if you wish to explain your answer, you may do so.

The Witness: Well, he must have when he was about six years old; he must have known right from wrong, because he was a pretty good child at that time.

Mr. Collier: Q. After the accident, Mrs. Ness, you saw him do some good things and some bad things, didn't you?

A. Yes, I did.

Q. And then it would be your opinion, Mrs. Ness, that he actually did know the difference between right and wrong, but disregarded it?

A. Yes.

Q. Paid no attention to it?

[fol. 374] (No response.)

The Court: What is your answer, Mrs. Ness?

Mr. Collier: She said yes.

The Court: What is your answer, Mrs. Ness?

The Witness: A. Yes.

Mr. Collier: That is all. Thank you.

Mr. Pelay: That is all.

Witness excused.

[fol. 375] GEORGINA INGHRAM, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pelay:

Q. Now, Mrs. Inghram, do you know the defendant?

A. Yes, I do.

Q. When did you first know the defendant?

A. I knew him to the point where he came to my house between the ages of 10 and 13. Previous to that time I had seen him going down the road to my brother's house.

Q. Where were you living at that time?

A. Down on St. Helens Road.

Q. Then, placing the age between 10 and 13——

A. I knew him from just 10 to 13.

Q. —under what circumstances did you know him? Just tell the jury.

A. His older brother came over to my house frequently and Morris would come along with him and walk in the house and sit down, sit in the corner. He would pick up comic books and sit there all afternoon. He wouldn't—I have two sons about the same age, and he wouldn't talk, he wouldn't laugh, I never did see the boy smile. He would be withdrawn, hold to himself. And when his older brother would get ready to go home, the older brother would say "Goodby, Aunt," to me, and walk out the door, and say he would see me in the next day or so. They came over an average of two or three times a week during the summer months. Morris would get up and follow him out the door, never say Goodby, never said Hello when he came in. And [fol. 376] the boys would go to the lake, swimming,—there was a lake across the road,—and I would go down with the boys. But Morris didn't swim with them, he didn't play with them down there. He had a Beebe gun and he would go off around the lake and shoot at frogs, like that, and he never did come around the children to be actually playing. I never did see him smile. And that was my experience with the child. He just wasn't a normal, sane child to play like they did.

Mr. Pelay: That is all.

Mr. Collier: No questions.

The Court: That is all.

Witness excused.

Mr. Ryan: If the court please, Dr. Haskins said he would be here at 10:30 or 11:00 and we have no further witnesses and I am just waiting for him now.

The Court: Take a ten minute recess. Will you remain seated while the jurors enter the jury room, please?

(A short recess was had, after which proceedings were resumed, as follows:)

[fol. 377] Dr. John L. Haskins, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Mr. Ryan: If the court please, at this time I offer in evidence the Circuit Court file of Multnomah County in the case of State v. Morris Leland, Criminal No. 24-404, and ask that the same be introduced in the record here.

The Court: Is that the file I considered in chambers a few moments ago?

Mr. Ryan: Yes, your Honor.

The Clerk: Defendant's Exhibit 22.

The Court: It will be received in evidence.

(The document referred to was marked by the Clerk Defendant's Exhibit 22.)

Mr. Ryan: In order to save time, your Honor, I won't read this now but will wait until after the doctor leaves.

The Court: It's understood, I believe, that any of these exhibits may be read in whole or in part at any time.

Mr. Carskadon: That was our understanding until Mr. Ryan made the objection, your Honor.

Mr. Ryan: I never understood at any time about it. At this time I'll read this whole thing, if you want.

The Court: Well, I have no desires in the matter. Is it the stipulation of counsel as far as this particular exhibit is concerned, that it may be read in whole or in part?

Mr. Collier: Your Honor, I think—the court did not consider the Circuit Court file in chambers.

The Court: That is what I was advised about.

[fol. 378] Mr. Ryan: Isn't that the Circuit Court file (indicating)?

The Court: Just a minute, gentlemen; if you will restrain yourselves for a couple of minutes I will look the file over. You have seen this exhibit for identification, Mr. District Attorney——

Mr. Collier: Yes.

The Court: ——which is Defendant's Exhibit 22. With the extractions the court has made, the exhibit will be received——

Mr. Ryan: If the court please, I don't want it in without the whole——

The Court: I say—one minute, please—with the extractions the court has made, the exhibit will be received in evidence.

Mr. Ryan: I don't offer it under those circumstances.

The Court: All right. I will sustain the objection to the exhibit as a whole.

Mr. Ryan: And I take exception to the ruling of the court.

The Court: You may. Now, distinctly understand what I say: You may offer the exhibit with the extractions, which you haven't as yet seen. The things I have removed from the exhibit are certain affidavits, certain letters, certain corespondence; and a written statement of Dr. Haskins, which may be used by either one of you gentlemen should developments during Dr. Haskins' examination justify it; together with a finding of fact with reference to ability to pay a hospital bill. All right. I understand you don't care to offer the exhibit with the deletions.

Mr. Ryan: Let me take a look at it.

The Court: I may observe, the reason I would permit the exhibit, with deletions, to be submitted to the jury is because [fol. 379] of the fact there has been an issue in this case with reference to this man's commitment to the Oregon State Hospital, and the exhibits and papers remaining in the exhibit for identification show the mechanical procedure by which that was accomplished and would for that purpose be competent evidence.

Mr. Ryan: If the court please, not to take any more

time, but I call your Honor's attention particularly to this order by Judge Hewitt, February 14, 1944: "And that the said John L. Haskins have and submit a written report as to the mental condition of the defendant, and it being stipulated between counsel for the State and for the defendant that said Dr. Haskins, if present, would testify to these facts contained in such written report." Would that alter your Honor's opinion with reference to that?

The Court: No. If the District Attorney wishes it, it could go in; but the doctor is here, himself, to testify in person concerning that very matter; so I don't consider it competent for that reason.

Mr. Ryan: I think I'll let it go. I don't see where it will do us any harm. I will offer it.

The Court: It is received over objection.

Mr. Collier: There is no objection now.

Mr. Ryan: I take an exception——

The Court (Interrupting): And, of course, an exception is allowed for the court's refusal to permit, shall we call it, Exhibit 22-A?

Mr. Ryan: All right.

The Court: 22-A. This (indicating) is in evidence, Mr. [fol. 380] Clerk, 22. And this (indicating) would be 22-A, which is not in evidence.

Mr. Ryan: What about reading it?

Mr. Collier: I don't care.

Mr. Ryan: May I, after the Clerk marks it, allow Dr. Haskins to refer to his letter in order to refresh his memory?

The Court: Do you have an independent recollection, doctor, of this case?

The Witness: Rather vague, sir.

The Court: I think you may refer to your letter.

Direct examination

By Mr. Ryan:

Q. Doctor, what is your name, please?

A. John L. Haskins.

Q. What is your occupation?

A. At this time I am manager at the U. S. Veterans Hospital, Roseburg.

Q. What kind of hospital is that?

A. Psychiatric.

Q. Will you give the jury some of your background and education and qualifications?

A. Graduate of the University of Minnesota. Four years in the army. Private practice a few years. Since 1928 I have been in psychiatry, eight years in New York state service; ten years Morningside Hospital, Portland; and since 1946 with the Veterans Bureau mental hygiene clinic for a time; for the last ten years in Roseburg.

Q. You are duly licensed——

A. To practice in Minnesota and New York.

Q. Are you a specialist in any field?

A. Certified by the American Board of Psychiatry.

[fol. 381] Q. What is that?

A. Certain standards—for many years a man could go out for a short time and take a course and say he was a specialist. But for a number of years the medical society has appointed boards, by which a physician must have certain qualifications and experience, and certain examinations, which they would,—after which he would be regarded as a specialist.

Q. And you are such?

A. Yes.

Q. As a psychiatrist?

A. Yes.

Q. Will you explain what that field covers?

A. That field covers mental diseases, that is, variations in the normal in behavior or thinking patterns, which may be mild or may be severe, anywhere from a mild neurosis to a severe psychosis, when the individual is completely out of contact.

Q. Are you—do you recall the defendant, Morris Leland?

A. I recall him after seeing my notes on him at the time. It was five years ago. I have seen quite a few patients since then.

Q. Do you recognize him here in court?

A. I wouldn't have recognized him unless I had been told who he was.

Q. You do now?
A. Yes. He has changed since five years ago.
Q. Do you remember the case?
A. I remember the case, yes.
Q. Did you make an examination of him?
A. Yes.
Q. At whose request?
[fol. 382] A. At the request of the attorney Edwin M. Lewis. I examined him February 5, 1944.

Q. Will you describe to the jury as well as you can the type of examination you gave him and the manner in which you examined him, and your findings?

A. Part of this is from an interview with others and from his own story, sitting down and talking with him over a period, discussing his difficulties with him, and not only what he remembered of it, but his attitude to what had happened and his reaction to the various difficulties he had been in.

Q. What was the particular difficulty that was involved in this case?

A. If I remember at this time, this was, I believe, a complaint that he had molested some girl or woman.

Q. What were your findings, doctor?

A. At that time I believed that he was not too intelligent but was intelligent enough to adjust in a normal way. That is a question of pure intelligence. But I did say that I didn't believe that he had much appreciation of right and wrong. He had had difficulties, which he admitted. He told these in a rather matter-of-fact way, without expressing much emotion, as an individual would in a jam of that kind, would express some emotion, some feeling of guilt or contrition, which he didn't show. In fact, I think one of the first things he said on asking him about his difficulty, he said, "Well, you have read it all in the newspaper,"—possibly a little proud of his difficulties. And I think I said at that time that a jail sentence wouldn't do him much good because [fol. 383] he would fail to learn by experience, which is the characteristic behavior. Most people if they get in trouble learn from experience—one of our best ways of learning. But these psychopathic personalities don't learn from experience; they keep repeating. I said a jail sentence

wouldn't do him any good, because he would be released and probably would be in the same situation again and I didn't believe he would profit from experience. I said I believed that psychiatric treatment may be of value. A psychiatrist may be able to work with this boy and bring about normal intelligence and integration of a personality; but the outlook was not very bright, but it might happen. And I recommended at that time that he be sent to the State Hospital for treatment.

Q. What about this question of right and wrong. Did you make any finding on that?

A. I said that he was emotionally incapable of distinguishing between right and wrong, I believed.

Q. What would be your prognosis from your examination of that time with regard to this young man?

A. He hasn't changed any, because, I said that the outlook is not too bright; that is, that the prognosis of the possibility of recovery, of integration of a normal personality, was rather poor.

Q. This type of mental disease, is it possible to do some good and have a good effect with psychiatric care?

A. Sometimes, if you get them early enough and work hard and long enough, maybe it could.

Q. Would this period in his lifetime be early enough?

A. Well, you would rather see them earlier. Then again, you may do some good at that time.

[fol. 384] Q. As a result of this was he sent to the State Hospital?

A. He was there——

Mr. Ryan: That is all.

The Witness: A. (continuing) —how long I don't know.

Mr. Ryan: Pardon me?

Mr. Collier: Will you read the last question and answer?

(The last question and answer were read.)

Mr. Ryan:

Q. What was the purpose of that?

A. The psychiatric treatment may be of value. A psychiatrist may be able to work with this boy and bring about normal integration of a personality.

Q. How long would that take, to have any results?

A. A long time.

Q. What do you mean?

A. Certainly nothing less than a year, a year and a half, two years.

Mr. Ryan: That is all.

Cross-examination.

By Mr. Collier:

Q. May I look at that report?

Mr. Ryan (interrupting):

A. What is the attitude of persons like this with reference to planning and doing things purposely?

A. I think planning, as a rule, is not particularly important. The individual acts on a—more or less impulsively; the thing occurs to them; it would be a good thing to do at that time. Anything that has happened before is not going to enter into it as a deterrent. It is an impulsive thing. At that time it seems to be a good thing to do, so they go ahead and do it.

Q. What kind of control do they have over will power? [fol. 385] A. I think that is depending on the character of——

Q. A person like him.

A. All psychopaths are not the same. I think that is a question that has been discussed a number of times in full length books. Nobody has ever concluded the right answer.

Mr. Ryan: That is all.

Mr. Collier:

Q. Doctor, as I understand it, at the time you examined him it was on the question of whether or not he was able to assist in his own defense?

A. That is right.

Q. You were not examining him to determine whether or not he had a defense of insanity?

A. A defense of insanity?

Q. Yes.

A. No. This was before trial, before the hearing, and was just a question I was asked to determine by the attorney, and whether I believed——

Q. Just a minute: You were not examining him to determine whether or not he actually had a defense of insanity?

A. No.

Mr. Collier: That is all.

Redirect examination.

By Mr. Ryan:

Q. Explain your answer.

A. Here was this man accused of a crime and I was asked by the attorney to examine him and try to establish the fact whether or not he was mentally, emotionally able to assist in his own defense. I said because he was a psychopathic personality he should be in the State Hospital rather than in [fol. 386] jail. I don't know whether the question of guilt or innocence—I don't know whether he confessed to anything or not; I don't remember; that wasn't my point.

Q. Now, you found him to be a psychopathic personality without psychosis?

A. I found him to be a psychopathic personality; I didn't say without psychosis.

Q. That is true, though, isn't it?

A. Where the psychosis begins and leaves off is difficult to say.

Q. But that would have been your finding?

A. I said he was a psychopathic personality and should be in the hospital. You would have to determine a great deal more about it, how psychotic he was, if he was psychotic.

Q. Did you know that he was sent to the hospital for approximately 60 days, at which time they found him to be a psychopathic personality without psychosis?

A. I never knew—as a rule we don't know how these things come out.

Q. A person who has a psychopathic personality without psychosis actually knows the difference between right and wrong, doesn't he?

A. He may know the difference between right and wrong, but he doesn't react on it.

Q. In other words, in lay language, they know what is the difference between right and wrong but they disregard it?

A. Yes.

Q. Now, as in this case, if you were advised that the defendant had approached a girl on the street and taken her down quite some distance by the river for the purpose of having sexual relations with her; that when he tried to [fol. 387] have sexual relations he found or learned that she hadn't had such relations before; and upon trying, it hurt her; you would say, I assume, that that is some evidence that he did appreciate the difference between right and wrong at that time. Is that correct? I am referring to this case now.

A. Of course, the only inference on that would be from you; I know nothing—I haven't examined him recently.

Q. I realize that; just on that question.

A. You would think that he had some feeling for another human being, at least.

Q. And wouldn't that include the idea of doing something wrong?

A. Well, I wouldn't necessarily say that. You have a sense of feeling for some one in suffering. How that would affect his judgment of right and wrong, I think that is an entirely different proposition there.

Q. Well, if he had no idea of right and wrong, would he go ahead and take into consideration another's feeling of pain? I mean in all likelihood.

A. Well, not apt to, no, not apt to.

Q. Now, there was a question put to you by Mr. Ryan, I took it to be a general question, regarding a psychopathic personality, regarding their ability to plan. Now, they have the ability to consider the doing of an act and thereafter acting upon it, haven't they, whether it is good judgment or not?

A. Well, yes. They are not going to let anything that happened before in their own experience affect what they do or how they plan it.

[fol. 388] Q. But they can consider, can't they?

A. They are intelligent. There is no question about that.

Intelligent enough to get along in society. Many are brilliant.

Q. Whether it is good judgment, whether their judgment is good, is something separate and apart?

A. Judgment has nothing to do with it.

Q. Assume that you were advised that after killing the girl in this case, he thereafter wiped his finger prints off on a lunch pail which he had had his hands on; that he thereafter covered the body and the pail with a blanket; thereafter—and these follow in order—he covered the blanket with logs or driftwood which concealed the body; the defendant having made the statement that that is the purpose he did it for, was to conceal the body; that thereafter he took the knife with which he had killed her and a long iron bar with which he also had killed her, and had thrown them in the river, according to him, so they could not be found; and in addition to that had picked up all the unburned portions of cigarettes that he had been smoking and destroyed them; and then left the scene: Would you or would you not say from those facts that the defendant did have the ability to formulate a plan and carry it out?

A. He realized he had done something wrong and was trying to cover it up.

Q. In addition to that would it not show that he had the ability to plan? Was that not a plan to avoid detection? Put it that way.

A. It was at that time, sir. What he did later, I don't know.

Mr. Collier: That is something else. I think that is all.

[fol. 389] Redirect examination.

By Mr. Ryan:

Q. Doctor, would there be any distinction, in your opinion, between what a person would do, a psychopath would do, in excitement caused by screaming, a girl that he had kept or had stayed down there with him for 36 hours, and a train going within 100 feet and men working on it, would he react any differently to that before he committed the act, before he committed the act of killing, than afterwards?

A. He might have had a panic afterwards. We don't

know what train of thought that set up in him and he realized he had done something wrong.

Q. Afterwards?

A. Yes.

Q. What about before?

A. What his state of mind was at the time he committed the crime, he might have been in a panic, fear of her screaming, or something, and she would be heard. It might have occurred to him that it would be a good thing to stop the screaming.

Q. How would a psychopath ordinarily react to that?

A. I don't think anybody can predict how one is going to act. One might run away; he might simply start to run, get away, and leave the girl there. Another man might quiet the screaming the way he did.

Q. What I am getting at, the question of their planning or setting out a course of conduct. Are they more likely to do, say, plan to cover up what they have done than plan to do something?

A. No. Whatever he did was possibly done, probably done, on the impulse of the moment. Then he realized what [fol. 390] he had done wasn't right and tried to hide it. What he did after that, I don't know.

Q. The fact that he may have stayed around in the general vicinity of the crime for several days, would that indicate anything?

A. It would indicate rather poor judgment, I should say.

Q. Is that typical of psychopaths?

A. One psychopath might realize he had done something and get out of the country, and another would stay around and wait for somebody to pick him up.

Q. If he turned himself in, would that indicate anything?

A. If would certainly be not consistent with his covering the body up and hiding it and then going and giving himself up later.

Mr. Ryan: That is all.

The Witness: I don't know what he did. I haven't followed this.

Mr. Ryan: Just a minute.

Q. Do psychopaths have episodic seizures of psychosis?

A. There are episodes in the life of most psychopaths where they are definitely psychotic.

Q. And the frequency of these? How often are they?

A. That is unpredictable. Some never have an episode when they are psychotic. Others have episodes when they are admitted to the hospital, quite frequently, or clinics for observation.

Q. Would that be brought on in the excitement of the moment?

A. Well, whether it would be brought on in the excitement of the moment or whether it existed previous to the excitement of the moment is hard to tell.

Q. But it could have some influence?

[fol. 391] A. Yes.

Q. Would it probably have some influence?

A. It would probably have some influence. Whether it did in this case or not, I don't know.

Q. It would be impossible to tell unless you were right there and observed it?

A. Yes; or saw him very soon afterwards.

Q. Having set out a plan of conduct, are they likely to abandon that plan?

A. Their consistency in following a plan that they lay out,—they do lay out a plan, but if something happened during this time, the impulse—they might do something else and abandon the plan.

Q. They don't follow through?

A. No.

Q. Do they have the ability to follow through?

A. That is, their lifetime pattern is the following of impulse rather than planning.

Mr. Ryan: That is all.

Recross-examination.

By Mr. Collier:

Q. Now, doctor, in regard to that last question,—they don't follow through: Let me present these facts to you: Suppose that on Friday, during the day, he had picked up the long iron bar that I referred to, saying that he had picked it up for the purpose of knocking her out; and that

he kept that bar with him Friday; and Saturday night—Saturday morning actually did use it for knocking her out. Wouldn't that clearly show that he followed through?

[fol. 392] A. I said that—I believe that question is answered. They may not follow through. I don't want to——

Q. In answer to my question: "Wouldn't that, having picked up the bar for a purpose and thereafter using it for that purpose the following day, wouldn't that show that he did follow through?

A. It looks as though he did in this case.

Mr. Collier: That is all.

Further redirect examination.

By Mr. Ryan:

Q. Suppose he had no definite purpose for picking the bar up, would he be able to state for which purpose it was?

A. It depends on whether he knows what he picked it up for and what he used it for, or whether he had—he said he knew what he was going to use it for. I don't know the background of the story.

Q. Just a second, doctor: This question he answered—Page 41—"Captain Browne: Q. What was your reason for wanting to kill her? A. Because, I had no reason at first. Q. Well, when you killed her, what made you make your decision that you should kill her? A. It just came to me (snapping fingers), just the second she started screaming. Q. Yes, but you said you previously had picked up this bar in case she started screaming? A. Just to knock her out. Q. Just to knock her out? A. That is right. Q. But you picked up the bar with the intention of using it if she started to scream? A. If I couldn't quiet her anyway." Would you say that that in itself would show he acted on impulse or according to plan?

A. At the time he acted on impulse to stop her screaming.

Mr. Ryan: That is all.

[fol. 393] Further recross-examination.

By Mr. Collier:

Q. Now, apparently that is going to become a question of the veracity of the person making the statement before. In another portion of his statement he says that "Friday night I considered the possibility of killing her. Saturday morning when I awoke she was about 20 feet away and I told her to come back. I was afraid she was going to run away. I told her to stay over there for a while because I was about to wind her off." Do you find evidence there of doing things on the impulse?

A. It sounds like contradictory statements.

Mr. Collier: That is all.

Further redirect examination.

By Mr. Ryan:

Q. Just a minute, doctor: Page 43: "Q. Did she say she was going to tell her mother or the police? A. She was bound to. Q. Was that the reason you killed her? A. No; as I stated a little while ago, the reason I killed her was because she started screaming, I had no intention of killing her originally. Q. What was your intention originally? A. What I told you at the first of the story." Now, doctor, are these psychopaths more likely to act on impulse or on planning?

A. They are more apt to act on impulse. That is part of your definition.

Q. Would you consider the defendant a clear psychopath from your examination?

A. The examination I made five years ago, at that time I thought he was a psychopath.

Q. Is that condition likely to change?

A. Well, once a well established psychopath, they are apt [fol. 394] to remain that way.

Mr. Ryan: That is all.

Further recross-examination.

By Mr. Collier:

Q. If—the impulse is a conscious thought, is it not?
A. Yes; it is not the sort of thing you do in hypnotism.

Mr. Collier: That is all.

Further redirect examination.

By Mr. Ryan:

Q. May I ask you, is it the same impulse an animal might have?
A. ——

Mr. Ryan: That is all.
The Court: That is all, sir.
Witness excused.
Mr. Ryan: At this time I offer defendant's army and Veterans Administration record. We had some discussion, I don't think the court made a ruling on it. This is the record of his hospital treatment by the United States army and the Veterans Administration. As the court understands, it was brought down here by the proper custodian and we stipulated at that time that he need not wait.
The Court: Has that been marked for identification?
Mr. Ryan: Yes, it has.
The Court: Have you examined this record in detail?
Mr. Collier: No, sir.
The Court: I will reserve ruling on it.
Mr. Collier: Are you through?
Mr. Ryan: No, not quite.
Mr. Collier: I mean with your witnesses.
Mr. Ryan: I am through with my witnesses. I have just [fol. 395] one more exhibit.
Mr. Collier: Go ahead.
Mr. Ryan: At this time I offer Defendant's Exhibit 20 which is the Good Samaritan Hospital record which we had the long discussion on.
The Court: There is no question but what this is the complete record, Mr. Ryan?
Mr. Ryan: That is right.

The Court: I think it is admissible in evidence. Again, however, I make the observation I made before that in all of these technical reports of hospitalization and treatment there appears so much that really needs interpretation by some one who knows, that I do wish that when records of this kind are offered, that an effort be made to interpret such portions of them as need interpretation. But it will be received in evidence. All right.

Mr. Ryan: If the court desires——

The Court: I have expressed myself. There it is. This is—20 for Identification is received in evidence.

(The document referred to was marked by the Clerk Defendant's Exhibit 20.)

Mr. Ryan: With the exception of this material which I think would be more properly surrebuttal, that we are receiving from the State Hospital, that closes our case. I would like to read these exhibits at this time unless—Mr. Collier, I think, had a statement here with regard to one of the witnesses.

Mr. Collier: Well, no; go ahead and read them. I will make the statement afterwards.

The Court: All right.

[fol. 396] Mr. Ryan: I might say, your Honor, that I have competent medical testimony in the event this does need clarification.

The Court: What exhibit is this you are reading now?

Mr. Ryan: No. 20.

The Court: You need not report the reading of the exhibit, I take it, Mr. Reporter.

Mr. Ryan: No, no.

The Court: All right.

Mr. Ryan: I might state these are the records that have been photostated from a microfilm of the Good Samaritan Hospital and they have been in the custody of the hospital up until the time of this trial.

Mr. Collier: I might stipulate that as far as we are concerned it isn't necessary to read much of that matter which doesn't pertain to the matter, except the portion you are interested in. You can read whatever you want, as far as we are concerned. I am not asking you to read every bit of it.

The Court: Go ahead, Mr. Ryan.

Mr. Ryan: (Reading from Defendant's Exhibit 20. During the reading the following occurred)—

A Juror: Your Honor, may I be excused for a couple of minutes?

The Court: No. I think we had better adjourn at this time and complete the reading Monday morning.

Mr. Collier: Your Honor, I have had Dr. Evans here for two or three days——

The Court: Ladies and Gentlemen of the Jury, we will take a ten minute recess. Will you please remain seated until the jurors have left the court room?

[fol. 397] (A short recess was taken after which proceedings were resumed, as follows:)

The Court: Proceed, Mr. Ryan.

Mr. Ryan: (Reading from Defendant's Exhibit 20. During the reading, the following occurred)—

The Court: Mr. Ryan, I suggest since we are not reporting your reading, you skip the ad libbing and read what you want to read.

Mr. Ryan: All right—(Continuing reading from Defendant's Exhibit 20). All right. That is all.

The Court: We will adjourn at this time until 9:30 Monday and I know you understand we are doing everything that can and should be done to make your responsibility as easily discharged as possible and least onerous. This happens to be Mr. Graham's afternoon off. Mr. Clement—is he here, so the jury can see him? At any rate, he will be presented to you—he will pinch hit for Mr. Graham for a few hours. I will be in my chambers here until four or five o'clock, or something like that, and will be available if needed. And as I have cautioned you before, and I know you fully understand, do not discuss the case among yourselves or express any opinion upon it. Nine-thirty Monday morning, if you please. Will you remain seated, please, until the jury enters the jury room?

(Thereupon court adjourned until November 7, 1949, at which time proceedings were resumed, as follows:)

[fol. 398] November 7, 1949.

The Court: You may proceed, Mr. Ryan.

Mr. Ryan: At this time we will offer Defendant's Exhibit 19 for Identification into evidence.

The Court: The Veterans Administration record?

Mr. Ryan: That is right.

The Court: Any objection, Mr. District Attorney?

Mr. Collier: No objection.

The Court: 19 will be received in evidence.

(The document referred to was marked by the Clerk Defendant's Exhibit 19.)

Mr. Ryan: I won't read it at this time.

The Court: It may be read in whole or in part at any time?

Mr. Collier: Well, except in argument. I don't care to read it this minute, but I don't want him to wait for argument to read it.

Mr. Ryan: I won't read it in argument. I promise that. That is the defendant's case, with the exception of this hospital record, which I think would be more properly sur-rebuttal anyhow.

Mr. Collier: The State will recall William Browne.

[fol. 399] William D. Browne, a witness on behalf of the State of Oregon, was recalled and, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Collier:

Mr. Collier: Let the record show that the witness has been previously sworn.

The Court: Yes.

Mr. Collier: I assume that is sufficient, isn't it, your Honor?

The Court: What is that?

Mr. Collier: I assume that is sufficient, isn't it?

The Court: Yes.

Mr. Collier:

Q. Now, I call your attention to the morning that the defendant's statement was read to him, at which time he signed it. Now, after that, would you tell the jury what happened?

A. Well, yourself, detective Robertson and I were in my office with the defendant and an inquiry was made as to his army service, military service, during the war, and he stated that he had been in the army, but for only a very short time. And inquiry was made by you as to what type of discharge he had, and he wouldn't answer that. We asked him why, and he made the remark that "If I decide to plead insanity, you would have that information; you could use it against me," or, "you could use it."

Mr. Collier: That is all. You may cross examine.

Mr. Ryan: No cross examination.

Mr. Collier: That is all.

The Court: That is all.

Witness excused.

[fol. 400] Dr. John W. Evans, called as a witness on behalf of the State of Oregon, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Collier:

Q. What is your full name, please?

A. John W. Evans.

Q. You are a regularly,—duly licensed to practice medicine in the State of Oregon?

A. Yes.

Q. What particular phase of medicine have you followed?

A. I specialize in psychiatry.

Q. What is your background on that?

A. University of Oregon Medical School, graduate 1933; internship Medical School Hospital '34-35—'34; and four years of graduate training in psychiatry from '35 to—'34 to '38. Since then in private practice except for the war years when I was in psychiatry in the army.

Q. Did you spend some time working with your father?

A. No.

Q. At my request did you make an examination of the defendant, Morris Leland?

A. Yes.

Q. How many occasions did you see him?

A. Three times.

Q. Tell the jury about that.

A. You mean to review my examination material?

A. Yes.

[fol. 401] A. I saw him three times; first, on October 5th, 1949; again on the 26th and on the 29th. And this was for the purpose of determining his past and present mental state, at the time I saw him.

Mr. Ryan: If the court please, I want to be heard in chambers as to the admissibility of any statement with regard to the first time he saw him.

The Court: I will hear you in chambers with the court reporter and the defendant and counsel.

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Ryan: I think this would be prejudicial and I don't think it should be in the record.

Mr. Collier: What is the name of that last case?—Nelson—You don't need any consent. That isn't causing him to testify against himself. Then, furthermore, I'll tell the court what I expect to prove by this: That the doctor visited Leland at Rocky Butte and attempted to talk to him, and he told him that he didn't want to talk to the doctor until he had seen his attorney first. And if nothing else, it shows his state of mind at that time, and ability to defend himself, and plan, and so forth.

The Court: What is wrong with that?

Mr. Ryan: Then I ask permission of the court to take the stand and tell what I did, and not waive my right to argue. I definitely made it clear to the defendant that he was not to talk to anybody without my permission.

[fol. 402] The Court: Well, that I don't know. I am not precluding anyone from taking the stand.

Mr. Ryan: Well, I waive argument?

The Court: Well, I don't think there would be any insistence upon that. If you believe you know something about the case, Mr. Ryan, that is—requires you to take the stand, I have nothing to say about it. You may or may not take the stand. But I will overrule the objection.

(The following proceedings were had in the presence and hearing of the jury:)

The Court: You may proceed. Read the last question and answer.

(The last question and answer were read.)

The Witness:

A. (Continuing:) I saw him first on October 5, 1949, at the Rocky Butte jail, for a few minutes, at which time the prisoner informed me that he couldn't go into his case with me. First he identified me that I was from the District Attorney's office and had been sent out by that office, and then he said he had been instructed by his attorney on no—that he would have to see his attorney first before he talked to me. So that was the end of that interview.

Then on the 26th of October I saw him in the county jail here in town, and at this time he told me that he had talked with his attorney and his attorney had given him permission to tell me his story. At that time I satisfied myself that he was aware that there was a charge of murder against him and that he was aware of the fact that he must defend himself. The story went as follows: [fol. 403] Soon after,—this is not verbatim; these are my words of his story—soon after his release from the county jail, and at 3:00 A.M. August 5th, he stole a car; while riding around—and while riding around——

Mr. Ryan: If the court please, pardon me: I don't mind the doctor referring to his notes to refresh his memory, but I do object to him reading his notes.

The Court:

Q. You have, I take it, no independent recollection of the conversation with the man——

A. Oh, yes.

Q. —in any detail,——

A. Yes.

Q. —and it will be necessary for you to refer to your notes?

A. Well, it makes it much more factual if I refer to my notes.

Q. You would have to refer to your notes in order to testify with any degree of accuracy?

A. It makes it more accurate.

Q. The objection is to the reading of the notes. Will you refer to your notes and then make your statement, rather than reading your notes?

A. Yes.

The Court: All right.

A. (Continuing:) While riding around in this stolen car he saw a girl and—alone—and was attracted to her with the idea of the possibility of picking her up. He stopped his car, got out and talked with her and she was not resistant to the idea of going some place and having sexual intercourse —in going some place with him. His idea was to have sexual [fol. 404] intercourse. So they went—I don't know my streets in that district—they went out St. Louis street, as far as I remember, and to the river, to a place between the Fourth Terminal and St. Johns Bridge, and there he informed her of his wish to have intercourse with her. He learned she was only 15, and a virgin, and gave up the idea. He didn't say whether he tried to have intercourse or not. He said after that had happened he realized that his original purpose of having intercourse was not going to be fulfilled, and then it became a problem of how to get out of this difficulty, and caused the idea to occur to him if he let the girl go at that point that she would tattle on him and, in his words, this would mean a 20 year sentence in terms of his past life. So, not knowing what to do, he waited on and kept her there with him all day and all night. I asked him what was done or what they did do all day and all night and the answer was "Nothing." Night came and he went to sleep in a blanket and she went to sleep near him in another blanket, fully clothed, and in the morning he awakened and

she was still there. He pointed out that if she had wanted to escape she could have done so during the night while he was asleep.

Then he came to the story of Saturday morning. Up to this point the story was given with a sort of deliberation, giving broad details, and I couldn't get any minor details as to what they actually did do from hour to hour during the day of Friday. Saturday morning he blocked completely on being able to tell me what went on Saturday morning, and stated that he was unable to recall that and to remember, and said one might consider it a blackout, and then went on to say "I am all upset," or words to that effect, "because [fol. 405] the jailers refused to allow me to visit privately with my folks just before you came,"—before I came to interview him that day. So he excused himself from going into the events of Saturday morning with me, which was, of course, a rather critical bit of information that I needed. And on the basis of considering it a blackout and the fact that he was emotionally upset over something that had occurred just before my visit, after considerable swearing and vituperation over this injustice that happened because he couldn't visit with his folks, he went on to state that he did recall the girl lying on the ground, dead, and he put driftwood over her, and that he threw his knife in the water.

Now, three days later I came back, feeling that he had—may have been so upset by the visit of his folks—that I might see him in a calmer state; and at that time I was unable to get anything more about his activities of Saturday morning; his state of behavior then being one of evasion and not answering my direct questions with direct answers.

The rest of the story was that he had left the girl's body hidden under the driftwood and had gone into town and had spent the next four or five days prowling cars, stealing cars, and drinking. He was picked up, then, six days later, in a stolen car and taken to the police station, and he said as he was entering the station, or the elevator, he had an impulse to tell about this incident on the river, and did.

We then went into his past history as to what he thought, what he could tell about his past and what seemed to be wrong with him; and during this period he talked much [fol. 406] more freely and rapidly and no great defense re-

gard, whereas throughout the discussion of the crime and events surrounding it, it was a deliberate, guarded type of talk. He knew nothing of his early childhood. He was the third of eight children. As to happiness at home, he wasn't happy because of his uncomfortable relationships with his father. "I never hit it off well with him," he said. As he recalls, he says from five on, he was always in trouble, in mischief at school, and later in the community, first with his elder brother in minor kid pranks and mischievousness, and later on, on his own, with car thefts, followed by 30-day sentences, and finally a rape charge and bad checks. He very hurriedly listed the various crimes and the sentences that came from them. He told me he was in the army for 89 days, most of the time in the hospital. He received a medical discharge but didn't know why or what his medical condition was, and couldn't tell me just what had happened at all. As a matter of fact, he seemed to block, as if he knew what happened and didn't want to tell me.

After his release from prison last January, after spending a year there, during which year he had been idle, not liking to work, and therefore had been kept in his cell for most of the year, he came out and said that at that time he felt that there was something wrong with him, something wrong with him, that made him repeatedly get into trouble. That he talked this over with his father and talked about getting some help from a psychiatrist, but he never got around to do anything about this.

As to his health: Every six or seven months he says that he has blasting headaches in the back of his head and has [fol. 407] had these for many years. He wonders if this is due to an injury that he had as a child at the age of seven, when he was knocked unconscious by a car. He doesn't know how long he was unconscious, but he was in the hospital. Following this, he suffered nothing but the headaches, as far as he knows, no fits or blackouts or such things that we call epileptic spells.

As to his behavior with me in these two interviews, I found him to be an alert, very live and tense, normally intelligent individual; as a matter of fact, a definite craftiness in his intelligence.

As I said, he was defensive and evasive and on guard,

mistrustful, wary. And an outstanding thing was his irritability, his marked, explosive hostility toward things, particularly about him, and things in the past. He seemed to have little control of his feelings and he certainly, well, I know he didn't bury them; he let his feelings out with no attempt to control temper or foul language, and so on. He was aware of the wrongness of his past actions; however, his finer feelings and sensitiveness about right and wrong was blunted. I felt that he showed a feeling of rightness and wrongness around the time of the crime, in that he told me about his preparations for intercourse, in which he talked of this and met the young lady and went quite a distance to a secretive place in order to carry this through, so he wouldn't be seen or found or caught, and that he showed this sense of rightness and wrongness in his conflict over the question of letting the girl go—Which would be right? Which would be wrong?—and later his covering of the body and his confession. These all meant to me that there was some feeling, and certainly knowledge, of the [fol. 408] right and the wrong there. As I said, he certainly is impulsive, as I saw myself and as his history tells one. He lives very much for the pleasure of the moment; little concern for past and future. On the other hand, in certain situations he shows, definitely, controls over his feelings and his willing, and he shows direction and purpose in his behavior. Here, again, I felt this was shown in events leading up to the alleged crime in his preparation for intercourse and his holding the girl, as a part of a defense plan, where he said he held her because he was afraid to let her go.

I asked him about his confession to the policemen at the jail, and he said as far as he knew, it was not from the standpoint of conscious guilt. I was asking about whether he had been suffering in the last six days with guilt over what he had done, if that hadn't led him to confess, and as far as he knew, it hadn't; and went on to say that he forgets things easily. I also asked him if he thought it was a dramatic move where he got a sense of power and gain; it was a hostile thing and that he was shocking the police and society by confessing; and he didn't feel that was so either.

My conclusions, diagnostically, again: I made a diagnosis of psychopathic personality without psychosis, and I was

thinking of this diagnosis as a term applied to a great group of individuals who are not mentally ill, nor are they candidates for treatment, but it is applied to this great group in which are found deep deviations in the character structure or personality structure. These deviations are described as self centered, hostile, insensitive for the ethical and moral [fol. 409] sense. Because of these defects in the conscious these people have a difficult time getting along with other people and usually busy themselves with criminal activities and devious sexual activities, lying and roaming about. They don't learn from experience and are liable to repeatedly act out their feelings in a gross sense. They know the difference between right and wrong but they don't feel the difference. This is a disorder of the emotions, basically, not of the intellect and the knowing.

I considered this point: What bearing could that head injury have on this boy's behavior? Because he gave a history of a head injury, with unconsciousness and behavior that can follow head injury in kids. Much of what he describes here is often enough seen in kids who get bad head injuries. And in the end, what we know from the facts, he had one, from the facts I have heard from some of the witnesses in court, the father's history, for example. And yet this business of psychopathic personality disturbance in the moral and emotional sphere can occur from reasons in connection with hereditary conditions, injuries happening at any time of life, and certainly most prominently from environmental things, as most commonly seen in second cousins.

I felt at the time I examined him that he was in good contact with the issues at hand and the reality of the situation. He was sane. It was—my conclusion about his behavior around the time of the crime, from what he told me, was that he knew right from wrong in and around the specific crime situation; that he behaved in a most purposeful manner.

[fol. 410] Mr. Collier:

Q. Now, among this general group of psychopathic persons, are there variations or differences between them, or are they all the same?

A. There are terrific variations. They are not all the same, and each one has to be considered as an individual even after you have classified him.

Q. Now, this particular individual, Morris Leland, would you say that he could or could not—strike that—would you say that he had or had not the ability to deliberate and premeditate?

A. Morris Leland has the ability to deliberate and premeditate.

Q. And does he have the ability to form a plan and act on it?

A. He also has that ability.

Mr. Collier: You may cross examine.

Cross-examination.

By Mr. Ryan:

Q. Doctor, isn't it true that a psychopathic personality, the constitutional psychopath, can either become that way by head injuries or have his condition greatly aggravated by head injury?

A. Yes. As to becoming that way, it takes more than a head injury to make a psychopathic personality. However, the head injury case and the psychopathic personality have many things in common.

Q. Are you acquainted with "Practical Clinical Psychiatry," written by Edward A. Strecker,—are you acquainted with Strecker?

A. Yes.

Q. And Frank G. Ebaugh?

A. Yes.

Q. I won't go over their qualifications. Are they—do you [fol. 411] consider them competent authorities?

A. Yes; as far as I consider any man an authority.

Q. It is a tough problem, I realize. Do you consider yourself an authority, doctor?

A. No.

Q. (Reading)—"Etiology,"—we are referring to a psychopathic inferior or constitutional psychopath. What does "etiology" mean?

A. The cause.

Q. (Continuing reading)—"There is considerable dispute as to the etiological importance of injuries, but obviously it is significant enough. Other causative factors are congenital syphilis, birth injury, such inflammatory infections as meningitis and certain neurological diseases, head trauma, endocrine disturbance and imbalance." Do you think that is an accurate statement?

A. As far as it goes, it is accurate. There are more causes than that, and important ones, that are not mentioned.

Q. These, however, congenital syphilis, birth injury, inflammatory infections and neurological diseases and head trauma, they are real considerations, are they not?

A. Yes; but I think one should keep this in mind very clearly: that when such things cause overt behavior disorders such as I have described, then the diagnosis is not that of psychopathic personality, but of head injury with behavior disorders, or syphilis with behavior disorders, or——

Q. In this case, if the parents complained shortly after the injury of serious head injury and complained that his personality changed, they noted the personality changes, do [fol. 412] you think that would affect your diagnosis and perhaps say that it was head injuries?

A. Yes; that is why I brought it up, because it brings in another causative factor as to why he has been behaving this way. I don't know the other causes: I got no childhood history. I don't know what really happened to this boy up to age seven, psychologically.

Q. I might read another text here: Are you familiar with this text, "The Manual of Military Neuropsychiatry," by Harry C. Solomon and Pat. I. Yakovlev?

A. No; I have known Solomon for a long time.

Q. He is professor of psychiatry at Harvard Medical School, medical director of the Boston Psychopathic Hospital; and Paul I. Yakovlev is clinical director of the Walter E. Fernald State School, instructor in Neurology at the Harvard Medical School. And, collaborating in the writing of this text are the—well, there is a number. Do you consider a text of that nature authoritative?

A. It should be.

Q. (Reading)—"Personality Disorders. Disorder of

personality is common in minor degrees after severe head injury. The less severe the head injury and the more prominent the change, the more some predisposition to periodic mood disorder should be sought. The psychopath tolerates head injury badly, and here the emotional disturbance is more important than organic damage sustained. A severe disorder in personality following a brief amnesia (e. g. less than six hours) is to be attributed to emotional factors and predisposition." Now, doctor, doesn't that [fol. 413] indicate that a psychopath, if he receives head injury, the condition is liable to be aggravated——

A. Yes.

Q. —and made worse?

A. Yes.

Q. Isn't it true that there could be latent in a person in early childhood, say up to five or six, a psychopathic tendency from a hereditary factor, or some birth injury, as one of these texts stated, and then the head injury would impel it to the attention of his parents and associates?

A. That is possible.

Q. It is probable too, isn't it, doctor?

A. Well, it is probable, possible. It is hard to say how much value is to be put on this head injury, because we know that straight out and out character deviations, as psychopathic personality, show up to six and seven. They have been there all along, but they show up in early school years, and it is hard to know which.

Q. Do you consider the following as an authoritative text: "Visual Outline of Psychiatry," by Leland E. Hinsie, M. D., professor of psychiatry, College of Physicians and Surgeons, Columbia University, New York, and assistant director of the New York State Psychiatric Institute and Hospital?

A. Yes; I accept that book and the author.

Q. In this book we observe the definition of "psychopathic personality." I want to know if you consider this an accurate definition: "Psychopathic Personality. In American psychiatry this term designates a nosologic or [fol. 414] disease entity,"—I believe Dr. Williams testified that "nosologic" meant disease—"characterized in the main by anti-social impulses and acts, such as lying, steal-

ing, injuring, arson, etc. An individual with psychopathic personality may have episodes of a true psychiatric nature, such as manic-depressive attack, a schizophrenic syndrome, or, less frequently, a psychoneurotic syndrome." Is that true, doctor?

A. Yes, yes.

Q. And it is true that this is a mental disease, psychopathic personality?

A. No.

Q. It says here that it is a nosologic or disease entity.

A. Yes; but not a mental disease.

Q. What does it affect?

A. He used the term "disease" in a very broad sense of the term "disease." It is a——

Q. It affects the emotions, is that right?

A. It is a disease, it is an ailment affecting the emotions, but not a mental disease as we usually use the term.

Q. Aren't the emotions controlled by the mind?

A. Yes.

Q. That is a part of your thinking process, isn't it?

A. Yes. It depends how broad you wish to become. You can confuse—the behavior disorders are mental diseases. Anything that varies from the normal can be called a mental or emotional disease, and, broadly speaking, psychopathic personalities are certainly diseased, personally and socially.

Q. And it is a factor in the functioning of the mind: your [fol. 415] mind isn't functioning because it doesn't have control over the emotions, isn't that true, doctor?

A. The control over the motions is not function, I wouldn't say. Mind is not—control is not good in a psychopathic personality.

Q. And that is a product of the mental function?

A. Yes; that is a part of what we call mental.

Q. I realize, doctor—is it true that the intellect is just a part of the mind?

A. That is right, that is right.

Q. And you have feeling; that is a part of your mind, your emotions and feelings?

A. Yes, yes.

Q. And your will power and your judgment is a part of the mind?

A. Yes.

Q. And your ability to reflect on things. It comes from a functioning of all those factors?

A. Yes.

Q. And it is a misstatement, medically, to state that the only part of the mind is the intellect, isn't that true,——

A. That is right.

Q. ——and——to determine the question of sanity. That isn't an accurate medical diagnosis, is it?

A. Absolutely no.

Q. Will you explain that to the jury?

A. Well, the intelligence of an individual, intelligence being just one factor, one part of a personality; he has many other functions besides intelligence; it has very little to do itself with disease, particularly with insanity. People who [fol. 416] become insane are found in highly intelligent groups on down to the low. There is no correlation between intelligence and mental disease or personality disease.

Q. Isn't it true that a psychopath is predisposed to episodic attacks of psychosis?

A. A psychopath is not predisposed to episodic attacks of psychosis any more than any other individual.

Q. Now, you say that. Is that the modern, accepted view?

The Court: I can't hear you.

Mr. Ryan:

Q. Is that the modern, accepted view?

A. That is my own personal view, because I can't go to a page and point out statistics on it.

Q. Now, I'll read—you stated you were acquainted with Dr. Strecker and Ebaugh and Ewalt?

A. Yes, I know them all.

Q. This book was printed in 1947. It is the sixth edition. I wonder if you agree with this statement, doctor: "Psychoses with Psychopathic Personality. The basis of these mental disorders is so-called psychopathic inferiority, which, in itself, however, is not a psychosis. In a strict sense psychopathic personality is a constitutional reaction, a kind of feeble-mindedness other than intellectual in which there is commonly defective emotional control and a lack of inhibi-

tion in the volitional sphere." Do you agree with that statement?

A. Yes, yes.

Q. Will you explain what they mean by "defective emotional control and a lack of inhibition in the volitional sphere"?

A. Well, that means that one has a poor control over one's [fol. 417] emotions and impulses.

Q. Volition has to do with will power——

A. Yes.

Q. —in the exercise of free will or wilfulness, does it not?

A. Yes.

Q. Would you say that is an accurate statement of the meaning of the word "volition"?

A. Well, to be accurate, volition is——

Q. Is will power?

A. —the same as—the word "will" can be used along with "impulse," "aggression,"—you would mean control over your impulses and aggression and volition.

Q. I will read you from Webster's Collegiate Dictionary——

Mr. Collier: If your Honor please, we will object to the reading from any dictionary again, on the basis the doctor has already defined what he meant by volition, regardless of Webster.

The Court: I will overrule the objection.

Mr. Ryan:

Q. (Continuing:)—Volition comes from the Latin "volo," I will, and "velle," to will; "volo," I will; the act of willing or choosing; the exercise of will; the termination of an act of choosing or willing; a state of decision or choice; "choice" and "determination" are synonymous; determined; the power of willing or determining. Is that an accurate statement of the meaning of "volition"?

A. I would accept that definition of "volition" as a clear enough statement of it.

[fol. 418] Q. "The record of the inferior,"—I am reading on in this text—"The record of the inferior is clearly written in his inadequate response to ordinary life situations. Many criminals, moral delinquents, tramps, sexual perverts,

drug addicts, etc., belong in this category. The pathologic personality may be the background for episodic psychotic attacks of irritability, excitement, depression, paranoid outbreaks, transient confused states, prison psychoses, etc." That is a true statement?

A. Yes.

Q. I read from the Manual of Military Neuropsychiatry by Drs. Solomon and Yakovlev, which you said you think would be authoritative: (Reading) "It is quite likely that the preexisting psychopathy may facilitate the development of some of the mental diseases. From a practical point of view, however, in regard to both disposition and treatment, such a disease should be considered in the light of the fact that it has developed in a person who previously did not show any signs of it." Isn't it true that these persons who suffer from this psychopathic disease are ofttimes confused with persons with psychosis? Maybe I haven't made myself clear.

A. I would have to say no, I don't think——

Q. They are not?

A. (continuing)—they are confused readily at all.

Q. Well, then, you think that there is never any confusion between psychoses and psychopathic personality?

A. No. There is very little confusion in the doctor's mind or the layman's mind as to the difference between psycho-
[fol. 419] pathic personality behavior and psychotic behavior. They are such totally different things.

Q. Are you acquainted with the text "Personality and Behavior Disorders in the Human Mind," a handbook based on experimental clinical research, by J. McCauley Hunt—I don't know what that (indicating)—is, Social Professor of Psychiatry, Brown University?

A. I don't know that book.

Q. Would you consider it an authoritative book? I might give it to you.

A. He is a psychologist.

Q. I got this from the University of Oregon Medical School.

A. Well, he is the editor and the articles are by these well known people.

Q. You think probably it is authoritative?

A. Well, if it has the names of the authors in the author list. These are—any book like that is bound to have 95% recognized truth in it.

Q. With reference to psychopathic personalities: "These studies were of importance because of the greatly increased emphasis on the side of the individual psychopath, rather than of a type or of a crime." Do you think that that is a proper approach to a person of this type, that you should study the individual and his mental disorder rather than the crime and test as to the type that he belongs to?

A. Yes. That was the point that I made before. You have to consider each so-called psychopath individually as a unique and different disorder.

[fol. 420] Q. Well, I'll lay off of text books for a while. The questions as to the defendant's premeditation and deliberation counsel put to you, are based upon your investigation in the three interviews that you made?

A. Yes.

Q. Do you think that he acts impulsively, as a rule, from those interviews?

A. Yes.

Q. Isn't it typical of this type of person that they act, not on reflection, but rather on the spur of the moment?

A. He acts very readily on the spur of the moment by impulse.

Q. You used the term "explosive hostility" in referring to the way he reacted to you and to the jailers up there. Isn't that typical of their behavior?

A. Yes.

Q. They lost their temper and have no control over it?

A. Yes.

Q. And, met with a serious problem, they react roughly, they explode, blow up, we might say?

A. Yes; but—more or less—there is nothing absolute about the behavior of Mr. Leland. He explodes, true; he tells me that he does, he gives it in his history, I saw it. On the other hand, there are many times when he does not behave with explosiveness. So sometimes he is very explosive and other times he seems very deliberate and thoughtful.

Q. Going back over a series of events back to the time of

[fol. 421] this killing, it is impossible to say whether he exploded or not, is it not?

A. As far as I know, he didn't tell me that he exploded any place around the time of the crime.

Q. Well, isn't it true that this type of person is generally a creature of the moment?

A. Yes, yes.

Q. And, unlike other persons, if panic once overtakes them, they are going to act on it much more easily than a normal person?

A. That is true, very true.

Q. And in a moment of panic, of impulse, and having, as Dr. Dixon used the term, the stimulus, having once had the stimulus for their course of action and become excited by it, then they don't act on reflection?

A. That is true.

Q. And if this girl started screaming and he said "It came to me like that," is that generally the way they make decisions?

A. That is right; under the stress of strong stimuli, you see.

Q. And that would be consistent, entirely consistent, with the psychopath's behavior?

A. Yes, yes.

Q. And any other explanation of it would be subject to doubt because it wouldn't—it isn't—they are not ordinarily persons who reflect under stress?

A. Well, Mr. Leland isn't one who reflects under stress.

Q. Isn't the whole pattern of this event a matter that was a matter of impulse and immediate action?

[fol. 422] A. Well, you see, I—except for your supposition or hypothesis that she screamed and he did something——

Q. He stated that is what happened.

A. —I don't know much about how impulsive he was, you see. As far as I know, he wasn't.

Q. Let me try to assist you: The fact he picked up a girl under the circumstances he did; he saw her and wanted her and he stopped and got her, is about what it amounted to. That wasn't something that the ordinary person—it wouldn't be done without any reflection at all, isn't that true?

A. Well, to a certain extent. I don't know how much reflecting he did, but not much, apparently. It was fairly fast motion, an impulsive process.

Q. With reference to having intercourse with her, whether it hurt her, or what caused him to desist, that isn't indicative of reflection either? What I mean, he can be dissuaded from a course of conduct as soon as he starts, just the minute he starts; he will vacillate in his direction?

A. Well, the way it was told to me in such broad terms that I don't know whether he reflected on this issue whether to have intercourse or not, whether there was much deliberation or whether he suddenly, impulsively decided not to have.

Q. Well, it seems to me if a person, an ordinary person, took a person down here several blocks from where he met her and walked all that distance, if he had been on a criminal action——

Mr. Collier: What it seems to counsel——

The Court: Read the question, Mr. Reporter.

(The question was read.)

[fol. 423] The Court: It is in the nature of argument.

Mr. Ryan: Withdraw it.

The Court: Reframe it.

Mr. Ryan:

Q. Apparently he went to a lot of trouble to get down there?

A. Yes.

Q. And then abandoned his project. Isn't that——

A. Yes.

Q. —consistent with the activity of a psychopath?

A. Well, I don't know but what that might be more ordinary.

Q. Well, if a person determines to have intercourse with a person and then abandons the purpose——

A. Yes; but as he told me, for a certain reason, which seemed an ordinary good reason.

Q. Suppose she didn't enjoy it, or screamed, or expressed pain, and he didn't get any actual pleasure out of it?

Mr. Collier: There is no evidence to base that statement on.

The Court: Well, in any event, it is cross examination of the doctor. It need not be entirely based on the record.

Mr. Collier: But he is assuming something that is not in the case.

The Court: Well, that might be, I don't know. I know counsel wouldn't intentionally misstate the record——

Mr. Collier: No; but he isn't——

The Court: May I complete my statement?

Mr. Collier: Yes.

The Court: I know he wouldn't intentionally misstate the record. I don't imply that he has done so in this instance. [fol. 424] But you may assume that for the purpose of questioning the doctor. All right.

Mr. Ryan: Will you read that question.

(The question was read.)

Mr. Ryan:

Q. Wouldn't a psychopath abandon it under those circumstances, that he wasn't enjoying it too?

A. Very likely.

Q. Doctor, the fact that a person who has committed a crime, such as murder, stays in relatively the same neighborhood and continues his criminal activity, such as stealing and prowling cars, during the period immediately following this crime, puts himself in positions time after time where he may be arrested, does that not indicate he doesn't understand the consequences of his acts?

A. Not necessarily. It tends to suggest that to me, but I know that he had hidden the evidence. I don't know how safe he felt, but——

Q. Suppose the evidence, instead of being buried, was piled up on the top of the ground in a pyre-like arrangement, and he put a blanket around it, and a hand would show through the blanket, and he piled some driftwood over it? I'll show you the picture that was taken, State's Exhibit 1.

A. Well, I agree that that suggests some defect in judgment and his defense mechanism.

The Court: Mr. Ryan, I think we will take a ten minute recess. Will you remain seated until the jurors have left the court room?

[fol. 425] (A short recess was taken, after which proceedings were resumed, as follows.),

The Court: You may proceed, Mr. Ryan.

Mr. Ryan: If the court please, I would like just a second to say something to Mr. Pelay.

The Court: Yes.

Mr. Ryan:

Q. Doctor, the fact that he confessed this crime several times, apparently without any force, is that indicative of anything, in your opinion?

A. Yes, it certainly is. However, I can only theorize as to its meaning, and I don't know.

Q. Bearing in mind that he is a psychopath, isn't it often that they will boast about what they do?

A. That would be one's first and primary suggestion, that it was a boasting, grand, action, or grandiose, expansive action, and, as I said before, with the feeling of shock and hostility behind it.

Q. And he was so mentally affected that despite the fact that he was endangering his own life, he would follow a course like that?

A. Yes.

Mr. Ryan: Now, if the court please, I should have looked at this before recess, but I have here a hospital record that we sent for, as you recall. I would like to introduce it for the purpose of further cross examination. However, I think there will be some objectionable matter here, and a lot of letters, that is not in any real order. The whole file is here and I would like to give counsel an opportunity to go over it, and maybe we can designate it.

[fol. 426] Mr. Collier: I have no—what is it?

Mr. Ryan: Do you have any objection to the introduction of this?

Mr. Collier: Yes, I do.

The Court: You have?

Mr. Collier: Yes, I do.

The Court: You have had a chance to examine the record, Mr. Collier?

Mr. Collier: Yes.

The Court: Do you want to go into chambers and go over it item by item?

Mr. Ryan: I would like to offer the clinical history.

The Court: Well, suppose you consider that in chambers and see what is competent? All right. The defendant will come into chambers.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Ryan: I offer these two, these three matters, which are, if the court please—and this (indicating)—I am offering herewith extraction of records of the Oregon State Hospital for the insane, consisting of the notes taken in the treatment, clinical history, and intelligence test, signed by the examiner, and the admission examination given him at the time he went to the State Hospital, and I ask they be admitted in evidence. I also offer Mrs. Leland's written answer to a questionnaire sent by the hospital.

Mr. Collier: These are matters that were not—that the witness Williams did not report on in any way. As a matter of fact, from the legal standpoint, they should not have been [fol. 427] required to have been produced at the outset.

The Court: I don't get the force of the objection to this test; all of this, as I understand it, being a part of a hospital record showing the hospitalization involved, whether the Oregon State Hospital or the Good Samaritan Hospital or any other hospital, makes no difference, and under the uniform business records act, as expanded to medical and hospital records, I understand that those records are prima facie admissible. The record is not offered in its entirety, but what is the objection to this sheet headed "Sneeden's Vocabulary Test"?

Mr. Collier: Oh, I don't think we have any objection.

The Court: It is received.

Mr. Ryan: I will offer the whole thing.

Mr. Collier: I think the letter of the father, or the mother—I think it is the father—the pencil written letter there is purely hearsay; and I think the records made by

the physicians there, the psychiatrist, the hospital—I don't object to them.

The Court: That includes a clinical history, Continued Notes, and the record of examination on admission?

Mr. Ryan: Yes.

The Court: They will be received in evidence.

Mr. Collier: It isn't the statement of any doctor.

Mr. Ryan: That was testified to in cross examination of one of my witnesses, and I think it is proper.

Mr. Collier: One part of it was, yes, where he says that the only trouble with him was that he was lazy; but whether that was to test the credibility of the witness and the truth [fol. 428] of his witness' statements and weight of his statements; but I think the letter itself, if he denied it, there is no question but what that could have been shown; but for this purpose I don't see it.

The Court: This apparently is a part of the questionnaire, being the answers to the questionnaire. Where is the questionnaire?

Mr. Ryan: There is no questionnaire in this record.

The Court: These answers of Mrs. Leland seem to be answers that are numbered, and I suggest referring to the questionnaire.

Mr. Collier: The questionnaire is lost.

(A discussion was had off the record.)

Mr. Collier: I doubt if anyone can tell what was intended or meant or what it was.

Mr. Ryan: The fact that this is part of the record and the fact that the District Attorney's office, in cross examining Mr. Leland, referred to this letter, would make it admissible for what it is worth.

The Court: It will be received in evidence, the letter of Mrs. Leland. They are all received in evidence.

Mr. Ryan: All received as one exhibit?

The Court: Yes.

Mr. Ryan: If the court please, I believe it would be in order that these two (indicating) should be photostated.

The Court: All right.

(The documents referred to were marked by the Clerk Defendant's Exhibit 23.)

[fol. 429] (The following proceedings were had in the presence and hearing of the jury).

The Court: Let the record show that these five extractions from the record of the Oregon State Hospital for the Mentally Diseased, considered in chambers, are received in evidence as Defendant's Exhibit 23, the five being included in one exhibit.

Mr. Ryan: You ruled on the reception of Defendant's Exhibit 23, if the court please?

The Court: Well, those that you offered are received in evidence, yes, as one exhibit, five extractions I think.

Mr. Ryan: Q. I hand you, doctor, Defendant's Exhibit 23 and call your attention to a test. Are you aware what type test that is?

A. I don't know,—that is Sneeden's Vocabulary Test.

Q. You don't know what classification?

A. I know of a vocabulary test, but not this.

Q. Would you be able to determine from the I.Q. rating that he has there, anything?

A. Yes. I can determine from this that he has an I.Q. of 81.

Q. What does that mean, doctor?

A. An I.Q. of 81 is in the subnormal group of intelligence quotients, the normal group being from 85 to 110, sometimes 115. 110 is the usual high. This falls four points below the lowest of normal 85.

Mr. Ryan: That is all.

Redirect examination.

By Mr. Collier:

Q. Will you read that now?

A. (Indicating a portion of the exhibit).

[fol. 430] Q. No, no: Mr. Ryan read to you one portion of one book which in effect said that a person having a psychopathic personality can develop psychosis or become manic-depressive and schizophrenic, and so forth. Insofar as this particular individual is concerned, did you find anything of that nature?

A. No, I didn't find any evidence, historically or in my direct contacts with him, that made me feel that he was grossly mentally ill or psychotic or insane.

Q. This particular type of personalities, psychopathic personality, does become psychotic——

Mr. Ryan: I object to that form of the question. It is leading——

The Court: I will sustain the objection to the form of the question.

Mr. Collier: Q. The effect of the text was to show that, sometimes these persons of psychopathic personality develop psychosis and manic-depressive. I asked you whether or not you found any evidence of this particular defendant having, at about the time of the killing involved, become psychotic or manic-depressive or any of those things mentioned by the text?

A. No; I found no such evidence.

Q. Where would you have found it, if it existed?

A. I would have found it in the historical review and recounting that he gave me of his movements and thinking on that Friday. Again, I would have found it in his account of his movements following the death of the girl.

Q. Now, getting back to psychopathic personalities in general: If they would develop psychosis, would that be for [fol. 431] a short or long duration that they would have the psychosis?

A. Well, they may have short or long psychotic periods. As to the short periods in psychiatry and medicine, from my own experience, short periods of psychosis last for periods of many days and weeks.

Q. Now, if you were advised, doctor, that on Friday, August 5th, the defendant had picked up a long iron bar for the purpose of knocking the deceased out; that Friday night he considered killing the deceased; that the following morning around 8:30, August 6th, that when he woke, the deceased was some 20 feet from him; that he told her she better come back and she did come back, and he told her that because he didn't want her to run away; that he had told her at that same time to stay over there because "I was about to wind her off;" and that approximately 45 minutes

elapsed after that time, at which time a freight train passed; she screamed so loudly that he thought the trainmen could hear her; that thereafter he struck her a number of times with the iron bar which he had picked up originally to knock her out with; that she didn't seem to be losing consciousness; he struck her some more and that she did become unconscious; and thereafter he plunged the knife into her body; would you say that he had acted impulsively on the moment, or that he had developed a plan, and that the passing of the train was the stimuli which put that plan into execution?

Mr. Ryan: If the court please, I object to that question on two grounds: First, it is an improper hypothetical question because it does not take into its hypothesis all the factors in the case and that has been brought out here [fol. 432] in evidence, and particularly the defendant's condition and the manner in which the act was committed. There is no definite testimony that he intended to kill her the night before, and if that is put in, there also should be put in there that he stated he didn't intend to kill her and didn't form that intention except "like that," as he testified there in his statement.

The Court: I think those matters should be included in the hypothetical question——

Mr. Collier: Well, your Honor——

The Court: One minute:—as well as the consideration of the examination that the doctor made of the individual.

Mr. Collier: This, your Honor, may I suggest, is redirect, and the obvious reason for those questions is that Mr. Ryan did ask him about that. He picked out the portion where he said the train came by and just "like that" he killed her.

The Court: That has been brought out. Include it in the question.

Mr. Ryan: And my second ground is that it calls for the determination by the witness of the particular fact, which is for the jury alone.

The Court: The question is not objectionable on that ground. Add that to the question.

Mr. Collier: Q. Having in mind what Mr. Ryan asked you to this effect, that, later on and in a different part of the statement the defendant stated in effect that when the

train came by,—he snapped his fingers; the record shows that he snapped his fingers,—at that time he decided to kill her. Now, that is the only addition and that is what this is, you might say, rebuttal.

[fol. 433] Mr. Ryan: He hasn't included everything in the hypothesis.

The Court: What should be included?

Mr. Ryan: That he testified in this deposition, or statement, that he made that he didn't intend to kill her before, and he got the intention "like that." And in addition to that, there is no definite testimony that he picked up this iron bar with the intention of killing her. He picked it up with several undetermined intentions; and most of these intentions were put into the defendant's mouth by the prosecutor in taking the statement. I think the hypothesis that the State is trying to establish here is directly contrary to the facts as shown in part of the confession—(reading) "Well, when you killed her, what made you make your decision that you should kill her? A. It just come to me (snapping fingers), just the second she started screaming. Q. Yes, but you said you previously had picked up this bar in case she started screaming? A. Just to knock her out. Q. Just to knock her out? A. That is right. Q. But you picked up the bar with the intention of using it if she started to scream?" Now there is no showing that he intended to kill her, and in order that this hypothetical question be properly put, it must include the whole of the facts. I understand the party's own witness must include all parts of the hypothesis.

The Court: The District Attorney's position is this: That you stated certain matters of evidence in connection with your cross examination and asked the doctor as to his conclusions, which is entirely proper. Now the District Attorney is calling his attention to other matters which he contends the evidence contains, to show that there is some [fol. 434] evidence of those other matters—whether it does or doesn't is for the jury—and he is asking the doctor his opinion with reference to those matters.

Mr. Ryan: He is asking a hypothetical question. The purpose of a hypothetical question is to state all the facts. My understanding of a hypothetical question is that the

party asking for an opinion from an expert is bound, in both direct and redirect, to include all the facets of the hypothesis and not just a portion of it. And it is impossible in this case to include them all, because the statement is contradictory, and I don't think it is a proper question for the doctor to answer, and I think it is improper and I think it is in error to permit it, and without showing just exactly everything that happened. And there is a doubt here, because there are two contradictory statements.

Mr. Collier: It is redirect on certain things he asked.

The Court. About the only additional thing you have added Mr. Ryan, is the correction of the District Attorney's assumption that he picked up the iron bar for the purpose of killing the girl. You say that that was not in evidence?

Mr. Ryan: That is not included in his hypothesis. Further, that at no time did he intend to kill her until she started screaming.

Mr. Collier: I am saying exactly what the defendant said. I don't say the defendant said he picked up the iron bar to kill her; he said he picked it up to knock her out; that is the statement.

The Court: Wind her up.

Mr. Collier: No; in the first place, Friday he picked up [fol. 435] the bar for the purpose of knocking her out. Saturday morning he woke up and the girl was 20 feet away and he told her to come back and she did come back. He said "You better stay over there." he told her to stay over there a while because "I was about to wind her off." That is Saturday morning. And Friday night he considered killing the deceased. My statement is not that he intended to, decided to; he considered it.

The Court: I think the statement probably, with these one or two additions, is adequate for this purpose, and that is rebuttal of testimony that was brought out on cross examination, and that a complete recital of every incident in connection with this matter is unnecessary when the witness is recalled and rebuttal testimony is offered. The question that was addressed to the witness on cross examination did not embrace all of the elements of the offense, and it was not necessary that it be done. Rebuttal testimony can be addressed to certain disclosures or information

or evidence and then on cross examination, of course, Mr. Ryan, you would be entitled to go into the matter further. I think the question is substantially in order. I find no particular objection to it and no quarrel with it. However, at this time you will have to reframe it because there has been so much said that obviously I think the doctor would find great difficulty in answering it. Reframe the question and try to include these matters that we have discussed.

Mr. Collier: Just one moment: Mr. Ryan, may I ask you whether you did or did not start with the question "It just come to me (snapping fingers)"?

Mr. Ryan: I think I started with "What was the reason for——

[fol. 436] Mr. Collier: Q. Now, doctor, suppose you were advised that Friday, August 5th, 1949, the defendant Morris Leland had picked up an iron bar for the purpose of knocking the deceased out; that Friday night he had considered killing her; that Saturday he awoke at approximately 8:30, at which time the deceased was some 20 feet away from him; that he told her to come back and that she did come back; he told her to stay over there because "I was about to wind her off"; that approximately 45 minutes passed and a freight train came by; the deceased yelled so loudly that he thought the trainmen could hear her; that thereupon he struck the deceased a number of times over the head with the iron bar; that she did not seem to lose consciousness and that thereafter he struck her more; thereafter she became unconscious; that thereafter he plunged the knife into her body; and later on, in the same statement, stating in effect that he had no reason for killing her, and that when he did "It just come to me (snapping his fingers), just the second she started screaming"; but that he had previously picked up the iron bar in case—asked whether or not previously he had picked up the iron bar in case she started screaming, he answered that it was "Just to knock her out"; the question "Just to knock her out?" being repeated, and he answered "That is right,"—is that as far as you want?

Mr. Ryan: No.

Mr. Collier: Q. (continuing) Questioned about if he picked up the iron bar with the intention of using it if she

started to scream: "A. If I couldn't quiet her anyway. Q. Did you make any other attempt? A. When she started to scream? Q. Yes. A. No."

[fol. 437] Mr. Ryan: That isn't all.

Mr. Collier: That is all you asked.

The Court: Go ahead.

Mr. Collier:

Q. (Continuing:) Now, taking those things into consideration, would you say that he had acted impulsively and on the spur of the moment, or would you say that the passing of the train put into execution an already made plan?

Mr. Ryan: If the court please, I object to that. It isn't a proper hypothetical question. I will point out some more inconsistencies with the record: In the first place, he stated that he hit her on the head and continued, and thereafter he stabbed her. The record shows that he hit her, I don't know how many times, and before he knew it he had dropped the iron bar and "I had a knife in my hand," "I don't remember stabbing her," "I stabbed her once or twice." It wasn't a split second, I mean it wasn't a deliberate plan whatsoever; it was a split second reaction. And further, it doesn't include all the statements in this confession. And whether I asked it before, or not, isn't important; still we have to show the state of being at the time. It should include this: He talks to her about letting her go home—Page 42—"Q. You had the bar for that purpose. When you awakened and she was twenty feet away, was she walking back? A. No. Q. Did you call her back? A. I told her she had better come back. Q. You told her she had better come back, and then did you pick up that bar of steel then? A. Not at that time, not till later. Q. What was the reason why you didn't want her to scream, or to leave you? A. Because I wanted to wait until that night. Q. Why? A. I would go with her. Q. You didn't want to be seen, did [fol. 438] you? A. That is right. Q. Well, if you had permitted her to go home you wouldn't have had to go with her necessarily, would you? A. Well, I would have had to leave the vicinity. Q. Did she say she was going to tell her mother or the police? A. She was bound to. Q. Was that

the reason you killed her? A. No; as I stated a little while ago, the reason I killed her was because she started screaming, I had no intention of killing her originally. Q. What was your intention originally? A. What I told you at the first of the story,"—and it goes on further.

The Court: Mr. Ryan, I think that you are attaching too much significance to the idea that this is a hypothetical question addressed to an expert on his direct examination by the party who calls him. The purpose of this, as I understand it, is to rebut, or attempt to rebut, testimony which may have been adduced on the cross-examination of the witness, wherein there were propounded to him certain statements of fact, not including, of course, all of the evidence with reference to this case. Now, on redirect the witness is called back and he is asked to assume certain things that apparently are in the record,—whether they are convincing or not makes no difference and I express no opinion, of course—and then to express his opinion concerning those facts. It is for that purpose. I think it is competent. I will overrule the objection; you may answer.

Mr. Ryan: May I make one more objection: I want the record to be very plain on my original objection, that he is invading the province of the jury in deciding facts that they are supposed to decide.

The Court: Of course, that is an untenable objection. [fol. 439] Where a question of insanity is involved, experts may testify with reference to the factual situation and draw conclusions from them, and he is not expressing an opinion one way or the other as to whether or not this man was or was not insane at the time of this incident. He is merely expressing his opinion with reference to the different elements that enter into the charge of first degree murder; that is, he is asking the witness with reference to whether or not this man, who allegedly was insane at the time, possessed certain faculties for action at the time. I will overrule the objection. Doctor, have you retained the substance of the question?

The Witness:

A. Two things come to mind from that question: First, in my opinion, this man was certainly able to contemplate

and discriminate, to mull over his situation which, to him, realistically, was a bad one, where he had to defend himself. So, in the first part of the question such items as picking up the rod to take care of some situation that might get out of hand; the thought crossing his mind that he might kill her, that might be a solution; and, we don't know, it isn't mentioned what other possibilities came to him as to how to solve the situation: the passage of time; and my feeling from that and from these acts of defense, the rod and the thoughts about a possible killing, to me indicate a certain thoughtfulness and a wish to strike on some plan and attempt to—that would solve this predicament, dilemma, for him. The last half of the question, the train, the screams, the attack, indicates, I think, very clearly, in my opinion, to me, an impulsive act set off by a train, a scream, an impulsive act with groundwork, of course, laid hours before for [fol. 440] it, in terms of the tensions and the confusion and the wonderment as to how he was going to get out of this. So your hypothetical question makes me say that this man certainly had the ability to control himself. For a long period of time he didn't do anything unusually rash, until finally or when the machinery was tipped off by a strong stimulus. So we have both controlled behavior and impulsive behavior at one point.

Mr. Collier:

Q. Counsel also asked you, in substance: Suppose she hadn't enjoyed the sexual act and didn't scream,—he made reference to that state of facts, I should say. You may state whether or not, with that supposition, as against the statement made by the defendant, that she had never experienced that act before and it hurt her when he tried, would that or wouldn't it be an—indicate a distinction between this individual and persons of psychopathic personalities in general?

A. If I am getting that question correctly, as to the fact that he withdrew from sexual contact with the girl because she was a virgin, it hurt her, and so on, as being possibly a different action than we would expect of most of the so-called psychopathic group. The best way to answer that is

to say that a psychotic individual, in rape, would not stop over the fact that the party was being hurt.

Mr. Collier: I think that is all,——

Q. Oh, what is a psychotic person?

A. A psychotic person is an insane person; is a person detached from reality. He lives in unreality. He has lost his moorings with real issues, with reality, and he doesn't obey [fol. 441] the rules of the real situation, and therefore in this instance would go ahead and commit rape regardless of these rather real factors of pain to the other party.

Mr. Collier: That is all.

Recross-examination.

By Mr. Ryan:

Q. If a person, a constitutional psycopath, such as the defendant here, controlled himself and did nothing for all night, during which time they slept together down there, and waited after they woke up in the morning for several minutes or hours, or whatever the testimony was, and did nothing, is it not true, doctor, that that would indicate that he hadn't formed a plan?

A. Yes. That indicates that no—I haven't heard of any plan from him or from your question. I don't know of any plan.

Q. Isn't it true that a psychopath, if he forms an intention to kill, or gets the idea of killing, he is not inclined to wait and let things take their course?

A. That isn't right; that is using the word "psychopath" too literally. After all, psychopaths relatively plan. They can plan a lot in certain situations; they can't plan at all in others. Some do plan well; others don't well, at all. Mr. Leland, to me, showed, as I said, a certain capacity for planning in certain situations.

Q. Under stress and strain, however, that might disappear?

A. It breaks down.

Q. Isn't it true that it is a more reasonable hypothesis to take, that the intention to kill, and everything, came into

being at the time of the screaming rather than by some cool plan formed in cool blood?

[fol. 442] Mr. Collier: That should take into consideration my question. I don't ask him to repeat it, but the doctor should take into consideration the question I asked.

The Court: Read the question, Mr. Reporter:

The Reporter (Reading): Q. Isn't it true that it is a more reasonable hypothesis to take, that the intention to kill, and everything, came into being at the time of the screaming rather than by some cool plan formed in cool blood?

The Witness:

A. I would like to answer that in the broad sense that each man has within him the intent to kill, in all of us. It is the deepest fear in the most of us. So, from a general standpoint, the intent to kill is there. The suggestion of the hypothetical question was that he had thought of the possibility of his killing and then he kills later. It seems to me it is some of one and some of the other; that is, there is some mulling over of it, some intent. It is there and is set into action by sudden stimuli.

Mr. Ryan:

Q. Do you think the plan was formed before or formed at the time of the screaming, the real plan, if there was a real plan?

A. If there was a real plan I think it was a loose plan, from the facts that I know about him, which need not have taken place, but the combination of events brought it into being,—the train whistle, the scream.

Q. He wouldn't form a deliberate and well-thought-out plan under the facts as brought out here?

A. Not under the facts that have been brought out here, no.

Mr. Ryan: That is all.

[fol. 443] Further redirect examination.

By Mr. Collier:

Q. Counsel used the words "well-thought-out plan." That takes into consideration a question of good or bad judgment, does it not?

A. That is true.

Q. And a person with poor judgment may plan an act and act upon it?

Mr. Ryan: Are you leading the witness? I object to that.

The Court: I will sustain the objection.

Mr. Collier:

Q. Well, can a person with poor judgment plan an act and act on it?

A. He can plan very well, many people with poor judgment, yes.

Mr. Collier: That is all.

Further recross-examination.

By Mr. Ryan:

Q. That isn't the only factor in this planning, poor judgment, is it?

A. No.

Mr. Ryan: That is all.

Mr. Collier: That is all.

The Court: That is all.

Witness excused.

The Court: Recess to 2:00 o'clock, Ladies and Gentlemen.

(A recess was taken until 2:00 o'clock P.M. of this date, November 7, 1949, at which time proceedings were resumed, as follows)

[fol. 444] November 7, 1949.

The Court: Do you have any further testimony, Mr. District Attorney?

Mr. Collier: State rests.

The Court: Anything further, Mr. Ryan and Mr. Pelay?

Mr. Pelay: We have one more witness, your Honor, just one more.

Mr. Ryan: I will call Mr. Pelay. I presume you have finished with your rebuttal?

(No response)

[fol. 445] ANTHONY PELAY, JR., called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. You are Anthony Pelay, one of the attorneys for the defendant in this case?

A. That is right.

Q. Do you recall talking to the defendant about making a statement to anybody else in this case?

A. I do.

Q. Tell the jury the circumstances and the story.

A. Immediately after being notified as to our appointment by the court to defend this defendant, Mr. Ryan and I went to the county jail to interview the defendant, and at that time, and as a condition to our representing the defendant, we both very, very definitely stressed that if we were to take the case and to defend the defendant, that he must under no circumstances make any statements or impart any information to any person whomsoever without first securing our permission and approval. We made that very emphatic.

Q. Was that clear to him?

A. It was, I would say, exceedingly clear to him after——

Mr. Ryan: That is all.

Cross-examination.

By Mr. Collier:

Q. Then it wasn't until after you and Mr. Ryan had talked to him considerably, and Dr. Dixon had talked to him, that Dr. Evans got to examine him, is that true?

A. No, that isn't true.

[fol. 446] Q. Did you talk to him afterwards?

A. I don't quite follow your question.

Q. Didn't you talk to him after that?

A. After our first——

Q. Yes.

A. Yes.

Q. Did you talk to him on a number of occasions?

A. Yes.

Q. Then, succeeding that, Dr. Dixon examined him and talked to him?

Mr. Ryan: If the court please, this goes beyond the scope of the direct examination. I don't think it is proper.

The Court: This was only addressed to the testimony of Dr. Evans this morning that when he first saw the defendant he refused to talk with him?

Mr. Ryan: That is right.

The Court: Let's confine the cross examination to that.

Mr. Collier:

Q. Between the time you first told him not to talk to anybody and the time Dr. Evans actually did examine him, Mr. Ryan and Dr. Dixon and you had talked to the defendant?

A. No.

Mr. Ryan: I move to strike that.

Mr. Collier: That is all.

The Court: That is all.

Witness excused.

The Court: Anything further, gentlemen?

Mr. Ryan: If the court please, at this time I would like to read some of the exhibits here that we didn't cover earlier.

The Court: Yes, if you wish.

[fol. 447] Mr. Ryan: I am at this time reading from Defendant's Exhibit 19, which is the Army and Veterans record of the defendant's treatment while in the Army Hospital, under examination by the Veterans Administration. I am going, if it is agreeable with counsel, to skip

over the documents that were introduced here that have no bearing on the facts in this case.

Mr. Collier: Oh, yes.

(Excerpts from Defendant's Exhibit 19 were read by counsel to the jury)

Mr. Ryan: That is all, your Honor, of that. I wonder if I could have my partner read this one for me?

The Court: Yes. Of course, they may be read in argument.

Mr. Pelay: This is the Defendant's Exhibit 23, it is very brief.

Mr. Collier: I assume we could read these, then, during argument?

The Court: Yes.

Mr. Pelay: Well, maybe if there is any question, let's read it now. Might I state that this appears to be the answer to a questionnaire.

Mr. Collier: Whatever is on the letter; nothing more.

Mr. Pelay: I believe you touched upon that in your examination.

Mr. Collier: Read anything that is on the letter and nothing more.

(Excerpts from Defendant's Exhibit 23 were read by counsel to the jury)

Mr. Ryan: That is our surrebuttal.

[fols. 448-451] The Court: Defendant rests?

Mr. Ryan: Defendant rests.

The Court: Take a ten minute recess, Ladies and Gentlemen. Will you remain seated until the jury retires to the jury room?

(The following proceedings were had out of the presence and hearing of the jury)

[fol. 452] COURT'S INSTRUCTIONS TO JURY

The Court: Ladies and Gentlemen of the Jury: It has taken a little longer than I anticipated. I am going to consult your wishes in this matter of either instructing you

now, or you may go out to dinner and I will instruct you after you return. It will take approximately an hour. Those of you who prefer to be instructed now, raise your hands. (Jurors comply.) Well, that is most of you. I will proceed with the instructions.

It now becomes my duty to instruct you regarding the principles of law applying to this case. Your function and duty is to pass upon and determine the facts, subject to the court's instructions. You are the sole and exclusive judges of the facts. You should let nothing that I may have said or done in the course of this trial lead any of you to believe that I have formed any opinion of my own regarding the facts, and if you have received any impression of that sort at any time in the course of this trial you should disregard those impressions, for the court has no right to influence you in any manner in your determination of the facts. You have no right to disregard the court's instructions regarding the law and to substitute therefor your own opinion as to what the law is or should be,

[fol. 453] The indictment we are trying in this case reads:

> "State of Oregon vs. Morris Leland, Defendant: Morris Leland, is accused by the grand jury of the County of Multnomah and State of Oregon, by this indictment of the crime of Murder in the First Degree; committed as follows: The said Morris Leland on the 6th day of August, 1949, in the County of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously, purposely and of deliberate and premeditated malice, kill one Thelma A. Taylor by beating the said Thelma A. Taylor with an iron bar and by stabbing the said Thelma A. Taylor with a knife, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. Dated at the City of Portland, in the County aforesaid, this 18th day of August, 1949."

To this indictment the defendant has entered two pleas. One is Not Guilty. The other is Not Guilty by reason of insanity. The plea of Not Guilty controverts and is a denial of every material allegation of the indictment. The ple

of Not Guilty by reason of insanity presents the question of the defendant's mental capacity to commit crime. The fact that an indictment has been found against the defendant is not evidence of the guilt of the defendant but is merely the formal method approved by law of bringing the charge before the court and the jury. You will have this indictment with you at the time of your deliberations and you will also have with you all of the exhibits that have been introduced in evidence, which I have checked with the Clerk and find [fol. 454] to be 1 to 23, inclusive, excluding Exhibit 2 and Exhibit 22-A,—is that correct, Mr. Clerk?

The Clerk: That is right, Judge.

The Court: The defendant is presumed to be innocent and this presumption attends him throughout this trial until such time as you are convinced beyond a reasonable doubt that he is guilty.

The law of the State of Oregon defining murder in the first degree reads as follows:

> "If any person shall purposely, and of deliberate and premeditated malice, kill another, such person shall be deemed guilty of murder in the first degree."

In order to convict the defendant of the crime charged it is necessary for the State to prove beyond a reasonable doubt each and all of the material allegations of the indictment and the material elements constituting this crime as set forth in the indictment. They are not established by the mere fact of the killing. These material allegations and elements are:

That defendant Morris Leland killed one Thelma Taylor.

That this killing was done unlawfully, feloniously, purposely, and of deliberate and premeditated malice.

That the crime, if any, was committed in Multnomah County, Oregon.

By "purposely" is meant an intent to do or commit the act charged in the indictment. It implies a purpose and willingness and an intention to commit the act. The words "malice" and "maliciously" are used in the broad legal sense of criminal intention, to define that state of mind of [fol. 455] a person who does a wrongful act intentionally

or wilfully and without legal justification or excuse, and does not necessarily mean spite or hatred toward the other; but it does import a wish to injure, vex or annoy another, established either by proof or a presumption of law.

Malice, therefore, relates to the actual state or condition of the mind of the person who committed the act. Malice in law means an act done wilfully and wrongfully without reasonable or justifiable cause.

"Deliberation" is defined to be that act of the mind which examines and considers, and thereafter determines that a contemplated act should or should not be done. By this I mean that the act must be considered and deliberated upon before its commission.

"Premeditation" is the process of thinking about the act before committing it. It is present when the intention to do an act is formed before the attempt to execute it. It implies a prior intention to do the act in question.

Deliberation and premeditation must have arisen while the mind was in its normal state and while the defendant was master of his own passion and temper, not influenced by any personal provocation or sudden hate of another, arising from any real or fanciful cause; the design must have been formed and matured in cool blood. If after the mind receives the thought of taking life, the deliberate resolution is formed to do this, the taking of a life under such circumstances, or with the defendant in this mental condition, would constitute murder in the first degree. It is sufficient if the deliberate and premeditated design to [fol. 456] kill preceded the killing by any appreciable length of time sufficient for reflection and consideration, and the formation of a definite purpose to kill, however short the time may have been. It is not necessary that the intent to kill shall be formed any specific length of time before the killing.

An act is as much premeditated that comes into the mind only a short time before it is committed as if it had entered the mind hours, weeks, or a considerable period of time prior thereto, if defendant had, in fact, resolved it in his mind, reflected on it and in cool blood determined to commit it. The question is not how long did he deliberate, but did he, in fact, deliberate? In other words, if an intention to

unlawfully kill exists and the killing is perpetrated pursuant to such intent and without provocation, then such killing is willful and purposely done.

If the mind fully and calmly forms a design to kill and the act is committed pursuant to such design, then it is premeditated, no matter how short or how long an interval of time may elapse before such design is executed.

Although defendant is charged with murder in the first degree, you have the right to determine that defendant has committed a crime of lesser degree and necessarily included in the crime charged, provided you are not satisfied beyond a reasonable doubt of his guilt of the crime charged, but are satisfied beyond a reasonable doubt that he has committed an included crime of lesser degree.

I instruct you as a matter of law, that murder in the second degree and manslaughter are crimes of a lesser [fol. 457] degree in this case. I further instruct you that you are not permitted to find defendant guilty of either unless you are satisfied beyond a reasonable doubt that all of the material elements constituting either of these crimes are present, if and when you are considering this matter; that is, the degree of crime.

Our statute defining murder in the second degree, in so far as it affects this case, reads as follows:

> "If any person shall purposely and maliciously but without deliberation and premeditation, kill another such person shall be deemed guilty of murder in the second degree."

The material elements of murder in the second degree are as follows:

That defendant Morris Leland killed one Thelma Taylor.

That this killing was done unlawfully, feloniously, purposely and maliciously, but without deliberation and premeditation; and

That the crime, if any, was committed in Multnomah County, Oregon.

Your attention has also been called to the fact that manslaughter is a crime of lesser degree included in the crime charged. Manslaughter is defined by our law as follows:

> "If any person shall without malice, express or implied, and without deliberation, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter."

[fol. 458] In order to establish a crime of this sort it is necessary for the State to show or to establish and prove beyond a reasonable doubt all of the material elements of this crime, which are as follows:

That defendant Morris Leland killed one Thelma Taylor.

That this killing was done upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible.

That the ~~crime~~, if any, was committed in Multnomah County, Oregon.

The burden of proof rests upon the State in this case to establish and prove beyond a reasonable doubt the truth of every material allegation in the indictment, and the material elements of the crime charged, or the material elements of any lesser degree of homicide. I have specified and called to your attention those material allegations and the material elements of the lesser degrees of homicide. This burden does not shift during the trial, but rests upon the State to the close. So if, after a careful consideration of all of the evidence, there remains a reasonable doubt in your minds as to whether this defendant is guilty of the crime charged in the indictment or a crime of lesser degree included therein, it will be your duty to give the benefit of such reasonable doubt to the defendant and return a verdict of not guilty. If on the other hand you are satisfied beyond a reasonable doubt that the material allegations of the indictment, or the material elements of any lesser degree of homicide, have been established beyond a reasonable doubt by the evidence, it will also likewise be your duty [fol. 459] then to bring in a verdict of guilty.

In establishing the degree of proof required, the State may rely upon either direct evidence or indirect, or circumstantial evidence.

Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact.

Indirect evidence or circumstantial evidence is that which tends to establish the fact in dispute by proving another and which, though true, does not of itself conclusively establish the fact, but which affords an inference or presumption of its existence.

An inference is a deduction which you as members of the jury make from the facts proved without an express direction of law to that effect.

A presumption is a deduction which the law expressly directs to be made from particular facts.

You are instructed that if from a consideration of all of the evidence in the case the same is susceptible of two conclusions or two constructions, one consistent with the guilt of the defendant and the other consistent with his innocence, then you are to adopt that construction or conclusion which is most consistent with his innocence.

The law conclusively presumes an intent to murder from the deliberate use of a deadly weapon causing death within a year. The law also conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another, but it does not conclusively presume that the killing under such [fol. 460] circumstances is murder in the first degree. And to constitute murder in the first degree there must be some other evidence of malice than the mere proof of the killing.

The plea of "Not Guilty" by the defendant in this case has put in issue, as I have stated to you, every material and necessary element of the offense charged in the indictment, and each and every material and necessary element of the lesser degrees of homicide to which I have called your attention.

Now as to the defense of insanity:

The defense of insanity has been interposed in this case, and this defense of insanity is a perfectly legal and proper defense to interpose, and it is your duty, under your oaths, to give to the evidence on this branch of the case, the same careful consideration that is required of you as you give to the other portions of the case.

The law presumes every man to be sane, until he establishes in the mind of the jury, beyond a reasonable doubt, the fact of his insanity. In other words, the burden is upon the party claiming insanity as a defense, to make out that defense beyond a reasonable doubt; and if you have any reasonable doubt as to whether the defendant at the time of the commission of the alleged homicide, was sane or insane, the State is entitled to the benefit of such doubt, and you should reject such defense.

Insanity, to excuse crime, must be such a disease of the mind as dethrones reason and renders the person incapable of understanding the nature, quality and consequences of his act, or of distinguishing between right and wrong in relation to such act.

[fol. 461] It is not every eccentricity of mind, however well established, that will excuse the commission of an act otherwise criminal.

A morbid propensity or inclination to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to the prosecution thereof.

The test of criminal responsibility is the power to discriminate between right and wrong at the time of the commission of the crime.

If a party, notwithstanding some mental disease or informity, still has reason enough to know that the act which he proposes to commit is wrong and unlawful; if he knows the nature and quality of the act, has the power of deliberation and premeditation, the power to do or refrain from doing the act charged as a crime, such mental disease or informity will not avail as a defense. In other words, while the law will not punish a person for an act which is the result of or produced by mental disease or infirmity, it will punish him for an unlawful act not the result of or produced by or influenced by mental disease or infirmity, even though some mental unsoundness or informity is shown to have existed. In its legal sense, insanity is a defect or disease of the mind which renders a person incapable of entertaining a criminal intent.

The defendant must have been mentally diseased to such a degree that his reason was dethroned at the time of the

commission of the act complained of. When reason ceases to have dominion over the mind, proved to be diseased, a [fol. 462] person reaches a degree of insanity where criminal responsibility, for the purpose of punishment, would no longer exist. The question of insanity has exclusive reference to the act with which the defendant is charged at the time of its commission, and it is his mental capacity at that time which the jury must determine. After all is said, the test of legal insanity is this: Did the defendant at the time of the killing, in the manner and form charged in the indictment, know what he was doing and that he was doing wrong? If he did know what he was doing and that it was wrong, he was legally sane and amenable to the law. If he did not know that what he was doing was wrong, he was legally insane, and is excused from the commission of the act, and in determining whether or not he was legally insane, you should accept the definition of legal insanity which the court has just given you.

In this case, evidence has been introduced relating to the mental capacity and condition of the defendant Morris Leland at the time Thelma Taylor is alleged to have been killed, and if you are satisfied beyond a reasonable doubt that the defendant killed her in the manner alleged in the indictment, or within the lesser degrees included therein, then you are to consider the mental capacity of the defendant at the time the homicide is alleged to have been committed.

There is a legal presumption, that a person intends the ordinary consequences of his voluntary act. This is a disputable presumption, and may be controverted or overcome by evidence, and so far as the capacity to form a criminal intent is concerned, it is sufficient to hold the defendant responsible under this indictment, when he did [fol. 463] the act charged, if you find he did the act charged and you find he had sufficient reason and understanding to know the nature, quality and consequences of the act he was doing, and to distinguish between right and wrong in relation to that act as I have heretofore stated to you.

If, after an entire consideration of the evidence in this case, you are satisfied beyond a reasonable doubt that at the time of the commission of the act charged in the indict-

ment, if it was so committed, as therein alleged, the defendant was laboring under a defect or disease of the mind which dethroned his reason, and rendered him incapable of understanding or appreciating the extent, nature, quality and consequence of the act he was committing, or that by reason of mental defect or disease he was unable to distinguish between right and wrong in relation to such act, he should be acquitted on the grounds of insanity, and if you should find him not guilty upon the ground of insanity, you must state that fact in your verdict.

On the other hand if you are not satisfied beyond a reasonable doubt that defendant was insane as the court has defined that term for you at the time of the committing of the alleged homicide, you should reject this defense.

The denial of the services of an attorney to the defendant during the preliminary investigation of the charge against him is not in violation of his constitutional rights. The magistrate before whom the accused is brought, and not the officers, is charged with the duty of informing him of his right of counsel and of furnishing him the opportunity to obtain counsel.

A reasonable doubt exists when your minds are in that condition that you cannot say you have and feel an abiding [fol. 464] conviction to a moral certainty of the truth of the charge against the accused. It is not a whimsical or capricious doubt. Absolute or mathematical certainty is not required, but moral certainty is required, that is, that degree of certainty which produces conviction in an unprejudiced mind, that degree of certainty upon which you would act without hesitation in your own most important affairs and concerns of life.

You are the sole and exclusive judges of the facts in this case, as I have stated to you before. You are also the exclusive judges of the credibility of the witnesses and of the value and effect of evidence. You are not to consider any part of this charge, these instructions that I am now giving you regarding the law, as an expression of opinion by me as to the merits of this case. Your power of judging the value and effect of evidence should not be arbitrarily exercised, but should be exercised with legal discretion, and in subordination to the rules of evidence.

You are not bound to find in conformity with the testimony of any number of witnesses whose evidence does not satisfy your minds as against a lesser number, or a presumption or other evidence that does satisfy your minds. That is to say, not from the number of witnesses testifying are you to find a verdict, but your verdict should be in accordance with the testimony you believe, and which convinces you beyond a reasonable doubt of the defendant's guilt, or which raises a reasonable doubt in your minds in his favor.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which he or she testifies, by the character of his or her testimony, by [fol. 465] evidence affecting his or her character or motives, or by contradictory evidence. You are not to draw any adverse presumption from the defendant's failure to testify.

A witness shown to be false in one part of his or her testimony is to be distrusted in others.

The direct evidence of one witness who is entitled to full credit is sufficient to prove any fact involved in this case. You may consider the manner in which the witnesses have testified, the character of their testimony, their motives, evidence affecting their character or motives, contradictory evidence, and it is for you to determine whom you will or will not believe, taking into consideration your experience as men and women of affairs, and your experience with people generally. The evidence of oral admissions and declarations of a party should be received with caution.

In arriving at your verdict in this case you will not be influenced by sympathy, passion or prejudice, but will base your verdict upon a calm and orderly consideration of the evidence subject to these instructions.

I instruct you as a matter of law that it is the duty of the magistrate before whom the defendant is taken to immediately inform the defendant of the charge against him and of his right to counsel.

This duty does not devolve upon either the District Attorney or the police officers as they are not magistrates. Under our law they are neither required to inform the defendant of the charge against him or his right to counsel during any

preliminary investigation, nor warn him that any statement [Vol. 466] or confession he may make may be used against him. A confession though made to police officers, and while in custody, if not induced by fear, violence, threats or promises of reward or immunity may be considered by you even though the accused may not have been cautioned that his statement might be used against him or advised as to his legal rights. You are to credit and evaluate any confession in the light of, and with respect to, all facts, circumstances and conditions attending it and to accord it such belief and credibility as you feel that under all the circumstances it is entitled to.

I instruct you that the existence of deliberation and premeditation in the defendant's mind may be inferred from the facts proved. Direct proof of such deliberation and premeditation is not necessary. Its existence may be inferred from the tangible facts in evidence.

I instruct you that when it appears the defendant has committed a crime and there is a reasonable doubt in which of two or more degrees he is guilty, he can only be convicted of the lowest of those degrees.

I instruct you that the elements of the crime of murder in the first degree, as "purposely," "malice," "deliberation" and premeditation, do not arise upon proof of the bare fact of the killing by defendant, but these elements must be proven by the State of Oregon beyond a reasonable doubt and to your moral certainty.

I instruct you that the evidence adduced during this trial to prove defendant's insanity shall be considered and weighed by you, with all other evidence, whether or not you find defendant insane, in regard to the ability of the defend- [Vol. 467] ant to premeditate, form a purpose, to deliberate, act wilfully, and act maliciously; and if you find the defendant lacking in such ability, the defendant cannot have committed the crime of murder in the first degree.

I instruct you that should you find the defendant's mental condition to be so affected or diseased to the end that the defendant could formulate no plan, design, or intent to kill in cool blood, the defendant has not committed the crime of murder in the first degree.

I instruct you that both deliberation and premeditation

imply a capacity at the time of the commission of a homicide to think and reflect—sufficient volition to make a choice.

In order to find the defendant guilty of murder in the first degree, you must find that he killed the deceased as the result of a deliberate and premeditated act, in pursuance of a design formed and matured by him when he was the master of his own understanding, and after he had had the time and opportunity for deliberate thought.

I instruct you there must be some evidence of malice, other than the mere proof of killing, to constitute murder in the first degree, and that purposefulness, deliberation and premeditation must also exist. Deliberation and premeditation shall be evidenced by lying in wait or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion. It is necessary that the deliberation and premeditation result in a complete and specific intention to commit an act and it must be formed in the defendant's mind so that he acts upon it.

[fol. 468] If you are convinced by the evidence, and under these instructions, to a moral certainty and beyond a reasonable doubt, that the defendant purposely and with deliberate and premeditated malice killed decedent, then your verdict should be murder in the first degree. It is then necessary to determine whether you should recommend life imprisonment for the defendant. This is an exercise of your discretion not to be entered into lightly, but approached with all humility and conscious of your duty. The fact that you are not required to make a recommendation concerning a death sentence, does not automatically create any presumption that the law directs a death sentence should follow. You need no reason for recommending life imprisonment for the defendant. It is a matter within your absolute discretion. If you feel in the exercise of your sound discretion that defendant should be imprisoned for life, then you should return the form of verdict which finds defendant guilty of first degree murder, but recommends life imprisonment.

In this case, certain documents, signed by the defendant, have been introduced as evidence. I instruct you that these documents are not, as a matter of law, confessions of guilt of murder in the first degree, or in any particular degree, but

are to be considered by you with all the other evidence in the case. A confession is a signed document in which the defendant admits his participating in a criminal offense. Insofar as these documents are concerned, it is solely for you, the jury, to determine how much weight should be given to them, and it is for you alone to determine whether they are to be construed as confessions of any particular crime or degree of guilt. In other words, Ladies and Gentlemen, [fol. 469] you are the sole judges of the weight to be given this evidence.

You are instructed that all the instructions I have given you regarding insanity apply with equal force and effect to temporary insanity. By temporary insanity, I mean that if you find that the defendant at the time he committed this act, by reason of mental disease, defect or infirmity, could not distinguish between right and wrong, then you must find him not guilty by reason of insanity.

I instruct you that to constitute murder in the first degree, it is necessary that the State prove beyond a reasonable doubt, and to your moral certainty, that the defendant's design or plan to take life was formed and matured in cool blood and not hastily upon the occasion.

I instruct you that in determining whether or not the defendant acted purposely and with premeditated and deliberated malice, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, and that even though you may not find him legally insane, if, in fact his mentality was impaired, that evidence bears upon these factors, and it is your duty to consider this evidence along with all the other evidence in the case.

Now, members of the jury, the first thing you will do after you retire to the jury room for the purpose of deliberating upon this case, is to elect one of your members as foreman, and then proceed with your deliberations and continue until you have arrived at your verdict, after which you will return the verdict you have agreed upon, with the signature of the foreman attached.

[fol. 470] In this case there will be six different types of verdict submitted to you for your consideration. Two of them involve a finding of murder in the first degree, one without a recommendation as to penalty, and the other

with a recommendation as to penalty; another provides for a finding of murder in the second degree; another provides for a finding of manslaughter; another provides for a finding of Not Guilty; and another provides for a finding of Not Guilty by reason of insanity. The first verdict reads as follows: "We, the jury, duly impaneled and sworn in the above-entitled court and cause, find the defendant Morris Leland guilty as charged in the indictment," and there is a line for the signature of your foreman. Twelve of your number must agree upon this verdict. In other words, this verdict, if returned, must meet with your unanimous approval.

The second form of verdict is this: "We, the jury, duly impaneled and sworn in the above-entitled court and cause, find the defendant Morris Leland guilty of the crime of murder in the first degree, and we hereby recommend life imprisonment." Twelve of your number must agree upon this verdict. And there is a line for the signature of your foreman. If you find this verdict, recommending life imprisonment, to be your verdict, the court will advise you that this recommendation is mandatory and imposes compulsory action on the court. In such event the penalty is imprisonment for life, and you shall assume life imprisonment means imprisonment for life. The court has no power to modify it. You have in first degree murder cases the right to determine the penalty, if you see fit. But in the event you bring in a verdict of guilty in the first degree [fol. 471] with or without recommendation, please bear in mind that either verdict requires your unanimous approval. Twelve of your number must agree upon such verdict.

The next verdict reads as follows: "We, the jury, duly impaneled and sworn in the above-entitled court and cause, find the defendant Morris Leland guilty of the crime of murder in the second degree," and there is a line for the signature of your foreman. Ten of your number may agree upon this verdict.

The next verdict is as follows: "We, the jury, duly impaneled and sworn in the above-entitled court and cause, find the defendant Morris Leland guilty of the crime of manslaughter," and there is a line for the signature of your foreman. Ten of your number must agree upon this verdict.

The next form of verdict is this: "We, the jury, duly impaneled to try the issues in the above-entitled case, find the defendant Not Guilty," and there is a line for the signature of your foreman. Ten of your number may agree upon this verdict.

And the last form of verdict is as follows: "We, the jury, duly impaneled to try the above-entitled cause, find the defendant Not Guilty by reason of insanity," and there is a line for the signature of your foreman. Ten of your number may agree upon this verdict.

If you will remain in your seats for a very few minutes, I will allow counsel exceptions in chambers and return immediately to the court room. The court reporter, counsel and the defendant will report to chambers.

[fols. 472-475] (The following proceedings were had out of the presence and hearing of the jury.)

The Court: Certain instructions were requested by each party to this case, the State and the defense, and in each instance where request was made and not given by the court, an exception is allowed. An exception is likewise allowed to each requested instruction given by the court in any altered or modified form. Has the defense further exceptions?

Mr. Ryan: I have one exception: I want it to show on the record in this case that we except to the instruction that insanity must be proven beyond a reasonable doubt, on the ground and for the reason that it deprives the defendant of due process of law under the United States Constitution.

The Court: I will allow an exception.

[fols. 476-479] IN THE CIRCUIT COURT OF THE STATE OF OREGON

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS

Comes now the defendant and requests that the Court give the following instructions:

[fol. 480] Instruction No. 11

I instruct you that if the defendant's purpose or intent to kill was formed in the midst of overpowering panic or fear, and followed immediately by the act, the defendant cannot be guilty of murder in the first degree.

State v. Henderson, 24 Ore. 103.

Instruction No. 13

I instruct you that the evidence adduced during this trial to prove defendant's insanity shall be considered and weighed by you, whether or not you find defendant insane, in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act wilfully, and act maliciously; and if you find the defendant lacking in such ability, the defendant cannot have committed the crime of murder in the first degree.

[fol. 481] Instruction No. 15

I instruct you that should you find that the defendant's mental condition be so affected or diseased to the end that the defendant could formulate no plan, design, or intent to kill in cool blood, the defendant has not committed the crime of murder in the first degree.

Instruction No. 16

I instruct you that if you believe the defendant killed the decedent in the manner stated in the confession, to-wit:

"It just came to me" (snapping fingers) "just the second she started screaming,"

then you cannot find the defendant guilty of murder in the first degree.

State v. Henderson, 24, Ore. 103.

[fol. 482] Instruction No. 18

I instruct you that the definition of the word "deliberate" is:

1. Formed or taken with deliberation; carefully considered; not sudden or rash; as, deliberate plans.
2. Weighing facts and arguments; careful and slow in determining;—applied to persons.
3. Not hasty or sudden; slow; as, deliberate speech. Webster's Collegiate Dictionary, 4th Ed. of Merriam Series.

Instruction No. 19

I instruct you that both deliberation and premeditation imply a capacity at the time of the commission of a homicide to think and reflect—sufficient volition, that is will power, to make a choice, and by the use of the mental powers, to refrain from doing the homicidal act. Not only such capacity is necessary, but you must be convinced beyond a reasonable doubt and to a moral certainty that the defendant did so think and reflect and act thereupon before you can find the defendant guilty of murder in the first degree.

26 Am. Jur. 187

Instruction No. 20

I instruct you that deliberation and premeditation import the opposite of passion, such as destroys volition; that is, will power and self control.

26 Am. Jur. 187

[fol. 483] Instruction No. 23

I instruct you that you must be convinced beyond a reasonable doubt, and to a moral certainty, that the defendant acted wilfully and intentionally,—in committing the act of homicide before you can find him guilty of murder in the first degree.

26 Am. Jur. 184

Instruction No. 24

In order to find the defendant guilty of murder in the first degree, you must find that he killed the deceased as the result of a deliberate and premeditated act, in pursuance of a design formed and matured by him when he was the master of his own understanding, and after he had had the [fol. 484] time and opportunity for deliberate thought. If you find that he formed a purpose or intent to kill the decedent in the midst of a heat of passion or mental turmoil or unreasoning fear, and that purpose or intent was followed immediately by the act of killing the decedent, then you cannot find him guilty of murder in the first degree.

[fols. 485-487] Instruction No. 26

I instruct you that there is evidence in this case that defendant is suffering from a mental disease which inhibits his volition, and unless you are convinced beyond a reasonable doubt and to a moral certainty that said evidence is false; then I instruct you that you cannot find defendant guilty of murder in the first degree.

[fol. 488] Instruction No. 31

I instruct you that a statement was made in argument by counsel for state to the effect that if the defendant were freed by a verdict of not guilty by reason of insanity, that there would be nothing that could ever be done about it; and that no commitment to an institution could ever be made unless it was voluntary on the part of defendant. I instruct you this statement does not conform to the laws of Oregon.

I therefore instruct you that the jury is to entirely disregard this argument and are not to consider it during their deliberations.

(Sec. 26-955 O.C.L.A.)

[fol. 489] Instruction No. 34

I instruct you that in determining whether or not the defendant acted purposely and with premeditated and deliberated malice, it is your duty to take into consideration

[fols. 490-500] the defendant's mental condition, his intelligence and the evidence his mind was diseased, and that even though you may not find him LEGALLY insane, if, in FACT HIS MENTALITY WAS IMPAIRED, that evidence bears upon these factors, and it is your duty to consider it with the greatest of care.

[fol. 501] Instruction No. 53

In the previous instructions the words "diseased mind" was used by the Court in its definition of insanity. I instruct you that when we speak of the "mental" condition of a person, we refer to his senses, his perceptions, his [fol. 502] consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding and perception, are connected with a healthy bodily organization. If they do not concur, he possesses a diseased mind.

State vs. Wallace, 60 Ore. 170

Mutual Life Insurance Co. vs. Terry, 82 U.S. (15 Wallace) 580, 21 L. Ed. (U.S.) 236, 239

Instruction No. 54

I instruct you that if you find from the evidence adduced in this trial that the defendant killed under an irresistible impulse or uncontrollable urge, then I instruct you that you must find the defendant not guilty of murder in the first degree by reason of insanity.

[fol. 503] Reporter's certificate (omitted in printing.)

[fol. 504] Plaintiff's Exhibit 15

Portland, Oregon,
August 11, 1949.

Statement of Morris Leland

The following statement was made by Morris Leland, Thursday, August 11, 1949, at the hour of 7:15 o'clock, a.m., in the offices of the Detective Division, Portland Po-

lice Station, Southwest 2nd Avenue and Oak Street, Portland, Oregon.

Present:

John R. Collier, Deputy District Attorney for Multnomah County, Oregon;
Captain William Browne, Portland Police Bureau.

Katherine Marlowe, Court Reporter.

[fol. 505] Questions by Captain Browne:

Q. Your name is Morris Leland?
A. Yes.
Q. How old are you, Mr. Leland?
A. Twenty-two.
Q. Twenty-two.

(Photographer enters room to take pictures.)

Mr. Leland: Oh, you are going to put that in the paper, huh?

Q. You are twenty-two now?
A. Uh huh.
Q. Were you born here in Oregon?
A. Yes.
Q. Whereabouts?
A. Portland. They don't have to keep trying. (referring to photographer).

Captain Browne: Turn over here and look at me; how is that?
Mr. Leland: No; they would still get a side view.

Q. Were you born here in Portland, you say?
A. Uh huh.
Q. Whereabouts, what part of town?
A. St. Vincent's Hospital.

[fol. 506] (Sergeant Mitola enters room.)

Sgt. Mitola: The boys already have a picture here of you anyway. You are not going to lose anything by this now;

that mug picture is worse. Look at the Captain and talk to him.—(Picture is taken.)

The Photographer: Captain, will you move in closer?

(Picture is taken; after which photographer and Sergeant Mitola leave room.)

Mr. Collier: Mr. Leland, the young lady sitting here at the table is Katherine Marlowe. She is a court reporter and would like to take a statement from you as to the death of this girl whom we know as Thelma Taylor. Now, you will be willing to give us a statement? I understand you have already told the officers about it?

Mr. Leland: Yeah; but this statement will be used on the trial, right?

Mr. Collier: Pardon me?

Mr. Leland: This statement can be used at the trial?

Mr. Collier: That is right. I will explain to you: You do not have to make any statement at all. And if you do make a statement it must be made of your own free-will and voluntarily on your part, without any threats or coercion on the part of anyone. And if you make the statement it can and will be used against you. Now, do you understand what I have said?

[fol. 507] Mr. Leland: Yes; I understand what you mean.

Mr. Collier: And knowing that, will you make a statement?

Mr. Leland: Anything I say in here may be used against me during the trial?

Mr. Collier: That is right, sir; the same as the statement that you have made to the officers.

Mr. Leland: Except that it isn't a written statement with my signature on it.

Mr. Collier: I understand your statement to the officers was verbal, is that right?

Mr. Leland: Yes; I told them, I told them I could take them to a body.

Mr. Collier: That is right; and you further told them that you had killed the girl, is that right?

Mr. Leland: Well, I wouldn't say that. If I am going to make this statement, we might as well start from the beginning, there is no use starting like that.

Mr. Collier: That is right; I want you to tell it the way you want to do it. But do you make a statement?

Mr. Leland: Well, in this statement do you want me to tell the whole story from the beginning?

Mr. Collier: That is what I would prefer.

Mr. Leland: To th end?

Mr. Collier: That is right.

[fol. 508] Mr. Leland: There is so many things I have got to remember yet. Well, it was last Thursday morning I believe you got that missing report, if I am not mistaken.

Questions by

Mr. Collier:

Q. Now, as you have noticed a calendar, Thursday would be August 4th, is that the day you are referring to?

A. Yes. That is the day you got the missing report, correct?

Q. I don't know, sir.

A. Whatever day you got the missing report was the morning I picked her up. Let's see, that was about a quarter to five. I ain't sure whether it was Thursday morning or Friday morning. Anyway, I had this car, '36 Ford coupe. I stole this Ford, see, and I was driving down Fessenden Street. This girl was walking up Fessenden towards—I can't think of the name of the street; anyway she was walking up to catch the bus, so she told me later. I parked the car off of Fessenden and approached her on foot. That was about, oh, it was a quarter to five in the morning. She was reported missing the same day. And from there we walked down to, we might as well say the river front, or [fol. 509] near the river. We stayed down there Thursday, Thursday night; and it was Friday morning about 8:30 when I killed her.

Q. Are you sure it was Friday morning?

A. I am awfully positive it was Friday morning; it might have been Saturday, but I am pretty sure it was Friday.

Q. I see.

A. In the meantime during Thursday, during the day time I picked up this piece of steel that they use on the railroad there. It is about a foot and a half long, about

half an inch around; and it was Friday morning I hit her with this piece of steel. It must have been about six or seven times before she even went unconscious. Then I think I stabbed her twice with a knife that was stolen out of a car. After I had—I didn't make sure she was dead, I took it for granted she was dead. She should have been, anyway. I took and covered her body up with driftwood there to conceal the body. I took the knife and piece of steel and threw it in the river right there. And then I left the scene. Last night when I was arrested on a car theft charge I told the patrolman on the wagon I wanted to see the officers from the Homicide Division, and I done told them this, this other fellow; and from there I took them down to the body.

Q. That, as I understand it, was the highlights of the [fol. 510] story?

A. That is about what you want, I think.

Q. This missing report that you referred to in the outset bears date August 5, 1949.

A. Well, she wasn't reported missing until the next day.

Captain Browne: That is the day she left; according to this she left home Friday morning at 4:10 a.m.

Mr. Leland: I thought it was Thursday. I don't believe they had time for the missing report until Friday.

Captain Browne: Well, the report was made——

Mr. Leland: (Interrupting.) If I remember right it was during Friday and Saturday, it didn't mention Sunday. In fact they wouldn't turn in a missing report on her until the next day, because they wouldn't know she was missing until the following day, or that night anyway when she didn't show up.

Q. (By Mr. Collier): Well, for your information, the information given to the Police Department by her parents is that she left for the bean pickers' truck at 4:10 a.m. this date, which is August 5, on this report, at North Oswego and Lombard.

A. What time was that report made up?

Captain Browne: That is the time we got it here in our office, but that is the next day.

[fol. 511] Mr. Collier: When this report was turned into the Police Department?

Captain Browne: No, turned into our office, the detective office; it is always a day later.

Mr. Collier: Well, it is turned into the Detective Office from the Missing Persons Bureau.

Captain Browne: No; it comes into us from the St. Johns Station.

Mr. Collier: I see. Anyway the report would be August 6th, the day after the report was made by the parents.

Captain Browne: Yes.

Mr. Leland: They couldn't possibly report her missing on the day she left home to go bean picking.

Captain Browne: It was that night, you see.

Mr. Leland: Well, that night, yes. It might have been after midnight, though.

Questions by

Captain Browne:

Q. When did you steal this car you had?

A. Well, I stole a car this same day.

Q. What car was it, the same car you were picked up in?

A. No, it was a '36 Ford coupe.

Q. Where did you steal it?

A. Down on Edison Street.

[fol. 512] Q. Edison Street?

A. Yes; I forgot the——

Questions by

Mr. Collier:

Q. Did you take the car——

A. I took the car before I took the girl.

Q. —that same day?

A. Yes, early that morning.

Q. So whatever day——

A. Whatever day the car was stolen is the day I met her. That is a good way to straighten it out.

Q. Let's go back to the beginning. You met her on what streets?

A. Let's see, that says at Fessenden and Oswego (referring to report).

Q. And that is out in St. Johns?

A. Yes, out in St. Johns.
Q. Was she afoot, walking?
A. She was walking.
Q. On what street was she walking?
A. She was walking up Fessenden when I first seen her.
Q. What direction?
A. Well, I would say towards Jersey Street, which is the main street in St. Johns; but she turned up Oswego.
[fol. 513] Q. And you were in the car?
A. No; I had parked the car right off of Fessenden Street on a side road.
Q. Had you seen her?
A. Yes; I had done seen her when I parked the car.
Q. I see. Had you ever seen her before?
A. No.
Q. Well, after you went up to her just what happened?
A. Well, nothing happened then.
Q. Well, did you talk to her?
A. Well, I did at first, yes.
Q. And what——
A. Well, I stopped her and started talking to her and asked her where she was going, and she said she was going bean picking; and then I mentioned to her, asked her if she wanted to go with me, and she didn't make no reply; and I didn't use no force, and she done went along anyway.
Q. I see. Now, I have here an identification card found in her wallet, and it is a Portland Traction Company student identification card. I will ask you to look at that and see whether that is the girl that you are referring to?

(Mr. Leland examined card.)

A. Looks something like it, but I wouldn't say for sure.
[fol. 514] Q. I see; all right. Then it might be well for you to describe her, if you can?
A. Well, I would say she was around five feet two or three; weighed about a hundred and five pounds, five or six pounds.
Q. What color was her hair?
A. I believe it was dark brown.
Q. And did she have glasses on?
A. Yes, uh huh.

Q. How old did she appear to be?

A. Well, taken right off, I wouldn't say right off until she told me; she told me she was fifteen later on.

Q. Now, you met her and asked her to go with you and she did go. Did she get in your car?

A. No, we walked.

Q. Where did you walk?

A. Down by the river.

Q. You did not get in the car at all?

A. No, not after I met her.

Q. I see. And did you have a knife with you at the time you met her?

A. I had a knife inside my coat.

Q. And that is the knife that you stabbed her with?

A. That is correct.

[fol. 515] Q. And you got that knife from where?

A. Stole it out of a car on Willamette.

Q. On Willamette?

A. Willamette Boulevard.

Q. Willamette Boulevard and where?

A. St. Johns.

Q. When did you take that knife?

A. I believe it was about August the 3rd.

Q. And do you remember what kind of a car it was?

A. 1939 or 1940 Oldsmobile, blue Oldsmobile sedan.

Q. And you say that you walked down to the river?

A. That is right.

Q. Now, how did you get there? By that I mean what route did you take?

A. Well, I met her on Oswego, and I turned off Oswego through a side road and went back down Fessenden; after you come up Fessenden for a ways you run into St. Louis, ans went up St. Louis Avenue and across St. Louis Avenue, and I believe went down Hudson Street, and turned left at the next street, and went straight down to Edison Street, which was that road that we went down there. And instead of going down that road the police car parked down below there, we turned left and went up Edison and went down that side path next to the woolen mills. There is a trail back down through there.

[fol. 516] Q. Now, do you know the name of that road, or

has it a name, that the officers parked their car on this morning; you left from that road on down the trail that you took?

A. You mean that dirt road?

Q. Yes.

A. Don't have a name. Somebody just made that road after the flood.

Q. And that is the nearest road——

A. Right.

Q. —to where you took her?

A. Well, it is the nearest one I can think of. It is about —I never went down that way though.

Q. Let me ask you this: Did you take the girl down the same way that you directed the officers this morning?

A. No.

Q. I see.

A. Went down by the Woolen mills, that is up towards the bridge.

Q. Well, now, this spot where you killed her, that was down the river from the St. Johns Bridge, wasn't it?

A. It was down toward the terminal.

Q. Yes.

A. Down towards Terminal 4.

Q. That is, it would be down the river rather than up the river?

[fol. 517] A. Well, it all depends on which way you call up and down river.

Q. Well, the river flows past Portland and then onto St. Johns and on, and that of course would be down?

A. That way, if you are going that way.

Q. I am referring to the way a river runs, it always runs down.

A. I know.

Q. So that would be down the river from St. Johns?

A. That is right.

Q. And about how far?

A. It was quite aways, I couldn't judge it right, I couldn't hit it right. Almost to the terminal, 350 yar-s from Terminal 4.

Captain Browne: Terminal 4; that is Terminal 4.

Mr. Collier: Terminal 4.

By Mr. Collier:

Q. Now, were you with her all day?
A. Yes.
Q. Was she carrying anything?
A. She had her lunch.
Q. And what was it in?
A. Which included her lunch pail.
Q. Pardon?
A. Her lunch pail also.
Q. Also was there a thermos bottle included with it?
[fol. 518] A. Inside of it.
Q. Inside of the lunch pail.

Captain Browne: It is out here, the lunch pail.

Mr. Collier: I don't know; did you find the lunch pail this morning?

Mr. Leland: I think so.

Captain Browne: That car was stolen on the 5th, that would be Friday morning.

Mr. Leland: Friday morning?

Captain Browne: After midnight.

By Mr. Collier:

Q. Now then, Captain Browne says that the report shows the car was stolen August 5th, that would be the day then that you met the girl?

A. That would be the morning; the day before I killed her.

Q. And that would be Saturday morning according to the calendar?

A. That is right.

Q. What did you do Friday morning?

A. Just walked down along the river and horsed around.

Q. Did you have any sexual relations with the girl?

A. I started to at one time.

Q. When was that, as to time of day?

A. Oh, I don't know what time of day it was. It was sometime in the morning.

Q. And did you complete it?

[fol. 519] A. No, I didn't.

Q. And why was that?

A. For the simple reason she hadn't ever had a sexual intercourse before.

Q. Now, where did you and the girl stay Friday night?

A. Stayed down there, down there at the same spot where the body was found at.

Q. Did you have sexual relations with her at any time?

A. No; just that one time that I mentioned to you.

Q. Now, I have here what appears to be a pair of girl's panties, with small blue and white checks; are they her panties?

A. Well, they could be; I couldn't say for sure.

Q. Well, have you seen these before?

A. I have seen them before, yes.

Q. When?

A. I couldn't say for sure when; it must have been sometime Friday morning.

Q. I see. That is while she was still alive? And how come they were off of her?

A. I told her to take them off! I tore them up to wipe the finger-prints off of the lunch pail.

Q. Did you take them off of her?

A. No, she took them off!

[fol. 520] Q. Well, tell me this: It isn't clear to me just why you would have to tear them up to get the finger-prints off of the lunch pail?

A. Well, it is if you look at it this way; You have got to hang onto the lunch pail at the same time while you wipe your finger-prints off with something or you would get them back on. In other words, I would wipe finger-prints off on part of it, and part of them would be on the other part.

Q. I see. Were they not large enough so that you could—

A. (Interrupting) No, they weren't.

Q. —hold onto the lunch pail and have one part of the panties in your hand?

A. You couldn't wipe off the whole lunch pail that way.

Q. Now, tell me, why did you think it was necessary to wipe off the finger-prints before she was dead?

A. The finger-prints was wiped off after she was dead.

Q. After she was dead?

A. Yes.

Q. I see. You didn't tell her to take off her panties because you wanted to use them to wipe your finger-prints off the lunch pail?

A. No.

Q. Why did you take them off?

[fol. 521] A. That was during the time I told you I was going to have a sexual intercourse with her.

Q. She had on a pair of blue denims, did she put those back on without putting the panties on?

A. That is right.

Q. Of course, I assume she had to have the blue denims off to get the panties off, didn't she?

A. That is right. She put them back on.

Q. At that time the panties were not torn?

A. That is right. The panties weren't torn until after she was dead.

Q. And do you know why, then, that she didn't put her panties back on?

A. Not exactly, no, I don't, unless it just could have been a slip on her part, because she really didn't need them anyway, she had on an over-all contraption anyhow.

Q. That is the blue denims I spoke of, isn't it?

A. That is right.

Q. Now, did you sleep there at that spot where the body was found Friday night?

A. Yes.

Q. And she too?

A. (Mr. Leland nods head yes)

Q. And did you have anything to cover yourselves with?

[fol. 522] A. We had them two blankets down there.

Q. I see. And where did you get the blankets?

A. Out of a car.

Q. And out of what car?

A. I couldn't say what car offhand, out of one I burgled.

Q. Did you get both blankets out of the same car?

A. No; I got one blanket out of one car and one out of another.

Q. Now, the heavier blanket, where did you get that?

A. I think I got it out of a Lincoln-Zephyr.

Q. And do you know where?

A. I know where the car was.

Q. About where, can you give us an idea?

A. About three blocks from Edison Street where we turned down there, where those defense houses are, to your left about a block.

Q. And when did you pick that blanket up?

A. About two days before that.

Q. Any special purpose in mind?

A. No special purpose.

Q. The officer has just handed me what appears to be a lunch pail, and it is empty, as you can see. Is that the lunch pail she had?

[fol. 523] A. Offhand I would say it was. Same color and everything.

Q. Was there lunch in it?

A. Well, she brought her lunch in it, yes.

Q. How did you know that?

A. Well, because she ate it.

Q. And you say that thermos bottle was on the inside?

A. It was at the time she opened her lunch pail up.

Q. And is this the thermos bottle?

A. Well, I wouldn't know about that.

Q. Does it look like it?

A. Well, only seen it once, it could be and it couldn't be; I only saw it once.

Q. Did you eat out of this lunch pail?

A. No.

Q. Did you eat any lunch?

A. No.

Q. Have anything to drink?

A. No.

Q. This lunch pail, for the purpose of the record, is a metal pail, green top and bottom and gray sides, with a handle and a snap lock. And you say that appears to be the same lunch pail?

A. I would say it was. Probably was.

[fol. 524] Q. And the thermos bottle is a small bottle which fits into the lunch pail, being black covered, with black and red and tan stripes around it. You couldn't say for sure if that is the thermos bottle?

A. Wouldn't say for sure, because I didn't pay no attention to it.

Q. Does it look like it?

A. Well, all thermos bottles look alike.

Q. The color and——

A. (Interrupting:) I didn't notice the color.

Q. I also have a blanket here, and it is a heavy tan blanket, which is of the style used—style and type used by movers; is that the blanket you got out of the Lincoln-Zephyr?

A. That is right.

Q. And do you know what year model that Lincoln-Zephyr was?

A. 1938 or '39.

Q. What color was it?

A. Green.

Q. Coupe or sedan?

A. Sedan.

Q. You think you got this blanket what day?

A. Either on the third or second, somewhere in there.

[fol. 525] Q. Second or third of August. And is this the blanket that you used to sleep under Friday night?

A. Yes.

Q. And you say there was another blanket. What kind was that?

A. It was a thin Army blanket, I believe, I am not sure, I don't know whether they got that one, too. I think I wrapped the body in it, I am not sure which.

Q. Was that out where you took the officers to the body?

A. That is right.

Q. And this too (indicating blanket)?

A. That is right.

Q. And where did you get that Army blanket, if it was an Army blanket?

A. Out of a car.

Q. Do you know where?

A. The same place I got that blanket, not the same car, another car in the same district.

Q. What kind of a car was it?

A. I can't remember what kind of car it was.

Q. Did you get it about the same day?

A. The same time.

Q. Now, when you met this girl early in the morning of August 5th, did you have these blankets with you?

[fol. 526] A. Not with me.

Q. They were in the car?

A. No; they was down in the sand there by the river.

Q. And was that near or at the same place where you took her?

A. Well, it wasn't in the same spot where the body was found.

Q. How near?

A. It was about fifty yards from there.

Q. How long had you been staying down there at that spot?

A. Oh, not very long, a day or two.

Q. This place where you and the girl slept Friday night and also the place where you killed her is in a clump of trees, isn't it?

A. Yes. I believe you would call it that. You don't need to say it was in a clump of trees, also blackberry vines.

Q. And that place cannot be seen from the road nor from the river, can it?

A. No, it can't.

Q. Well, did anything happen Friday night?

A. No. I went to sleep.

Q. And do you know what time about it was Saturday morning that you woke up?

[fol. 527] A. Between 7:30 and 8:00. At the time I woke up this girl was about twenty feet from where I was at.

Q. What was she doing?

A. I figure she was getting ready to take off.

Q. Well, what did that mean to you?

A. Well, at the time it didn't mean so much to me, except that I didn't want her to.

Q. I didn't hear that last?

A. I said, except that I didn't want her to. I told her that after I, I brought her back, told her she had better come back over there, and she come back, and I told her if she would dummy up—she said she wanted to go home, and I told her to wait until that night and I would let her go, which I was intending on doing. But about, it must have been about half an hour or forty-five minutes later a freight train come down, a yellow Diesel train, they were

switching cars up on that track up above, and she started screaming then.

Q. What happened then?

A. I hit her with this piece of steel.

Q. Well, aren't we a little just ahead of our story. When did you get the piece of steel?

A. Got it Friday during the day time down there by the [fol. 528] river.

Q. Well, what did you get it for? For what purpose?

A. Well, I got it for two or three purposes, in case might—I wouldn't say I got it just to use on her, I got it more or less just in case I needed it.

Q. Well, what did you think might happen which would cause you to need it?

A. Well, somebody liable to come along, or something.

Q. Well, suppose somebody should come along, what then?

A. Well, if they come along and just kept right on going, why, nothing would have happened.

Q. I see; but if they didn't?

A. Well, if they got to talking about it, I would knock them out.

Q. If they got to talking to you about it, about what?

A. Well, if they just got too inquisitive.

Q. That is one purpose now. You said you had two or three purposes. What were the other purposes?

A. Well, also I was afraid if she started to scream or something like that, somebody would hear her.

Q. And what made you think she might scream?

A. Well, I wasn't so much worried about her screaming, except it always can happen——

[fol. 529] Q. Except what? I didn't hear you?

A. Except it always can happen, you know, if someone happened to come along and she started screaming. In other words, as far as she was concerned, I wasn't afraid, I didn't exactly need this piece of steel to handle her.

Q. You could handle her without the piece of steel?

A. It was more or less if she started screaming if somebody come along and if they come over there, like I explained in the first place.

Q. Now, that is two purposes; what would be the third?

A. I don't know.

Q. Well, would it be to stop her from running away?

A. No; because she wasn't familiar with that part of the town, and she couldn't have gone no place if she had run away.

Q. I see.

A. I could have caught her before she got any place.

Q. Well, you hardly expected anyone else to come prowling around down there, did you?

A. Well, there is quite a few people come prowling around down there, when it ain't raining.

Q. What?

[fol. 530] A. When it ain't raining quite a few people come down there. There was one guy passed us about nine o'clock.

Q. Now, about what time do you think you picked up that piece of steel Friday?

A. Oh, it was late in the afternoon.

Q. And did you take her with you when you picked it up?

A. That is right.

Q. And where did you pick it up?

A. The exact spot I couldn't tell you, because the location there, I couldn't give you a location of that spot.

Q. Well, let's put it this way: How far was it from the place where you killed her?

A. About fifty yards.

Q. Why did you take her with you when you got it?

A. I wasn't going to leave her there where she could run off.

Q. Now, did she know you had the knife?

A. She seen the knife.

Q. How come she saw the knife?

A. Because I had it in a scabbard on my belt.

Q. What kind of a knife was it?

A. Like that (indicating knife held by Mr. Collier), but that isn't it there, the other one is wider. The other one is an M-3 Imperial.

[fol. 531] Q. You kept it in a scabbard, did you?

A. Yes, had it on my belt.

Q. Well, did you take it out and show it to her?

A. I had the knife out three or four times.

Q. And for what reason?

A. No special reason.

Q. What came up that caused you to take the knife out?

A. No special reason, I just pulled it out.

Q. Well, did you take it out so that she could see it?

A. Well, no, not necessarily. She could see it anyway without my taking it out, it was about as big as that one (indicating).

Q. Well, when you took the knife out the three times, did you use it for anything?

A. I think I whittled with it one time.

Q. I see. And the other two times you didn't use it for anything?

A. No.

Q. Did she say anything about this piece of steel when you picked it up?

A. She didn't.

Q. Did you tell her what you were getting it for?

A. I never said anything to her.

Q. Well, did you pick the piece of steel up to use it on [fol. 532] her if necessary? I believe you said you did.

A. No, not unless I decided to kill her.

Q. And then you did feel that you might use that piece of steel to kill her with?

A. No, not to kill her with, to knock her out with. I didn't need this steel as long as I had the knife to kill her with.

Q. I see.

A. If I decided to kill her.

Q. That is, you did think of the possibility that you might kill her?

A. Yes, I did. I did Friday night.

Q. And now, Saturday morning, you woke up and she wasn't right at the spot that you were?

A. That is right.

Q. And she was, you said, about twenty feet away?

A. That is right.

Q. And you thought that she was going to run away?

A. She would have if I hadn't of woke up.

Q. And did you say anything to her?

A. Told her to come back.

Q. And what did she do, did she come back?
A. She come back.
Q. And was there any more words?
[fol. 533] A. I never said nothing else.
Q. And what did you do?
A. Nothing. I just told her to stay over there awhile because I was about to wind her off.
Q. You said what?
A. About to wind her off.
Q. How long after did you hit her with a piece of steel?
A. About forty-five minutes later.
Q. Well, was there any—did you talk to her before?
A. Well, she said she was going to go home.
Q. And what did you say?
A. I told her I would let her go that night, stay right there in the day time, I was going to let her go that night, I was about to leave town. And about forty-five minutes after I told her that a freight train come down there and they was switching cars, and she started yelling, and I hit her.
Q. Was she screaming?
A. If you call it screaming.
Q. Well, what do you call it?
A. Well, yes, she was screaming about enough for them to hear on the railroad tracks.
Q. Well, that morning, Saturday morning, though, she said she wanted to go home, and just what conversation took [fol. 534] place about that?
A. She said she wanted to go home then, and I told her to wait until that night and I would let her go. In fact, I would take her on home and leave her about a block from there.
Q. What did she say to that?
A. She didn't want to wait.
Q. Was there any more conversation?
A. No.
Q. And what did you do?
A. I sat down and started smoking cigarettes.
Q. Well, how long after that did you hit her?
A. Forty-five minutes later.
Q. Four or five or forty-five?
A. Forty-five.

Q. How did that come about?

A. She started to scream.

Q. Well, what caused her to scream?

A. That freight train, the switchmen was up there on the railroad tracks, and they could hear her, at least they could have if she had.

Q. That was the second time?

A. That is the first time, she screamed for about three minutes anyway.

Q. When was that in relation to the time you told her to come back?

[fol. 535] A. That was about forty-five minutes after.

Q. The freight train come through, did it, about forty-five minutes after you told her to come back?

A. Yes.

Q. She screamed, you said, for about three minutes?

A. That is right.

Q. And what did you do?

A. That is when I hit her.

Q. Did you say anything to her before you hit her?

A. No.

Q. Then, as I understand it—and if I am wrong, correct me—after the, or rather at the time the freight train came through she screamed and after her screaming what did you do?

A. That is when I hit her with that piece of steel.

Q. I see.

A. She didn't stop screaming, she just kept on screaming.

Q. Now, just what happened? In other words, the mechanics of it when you hit her, did you hit her on the head or where?

A. I hit her alongside of the head.

Q. Well, did she raise her hand to protect herself?

A. Yes; in fact, I think I hit her hand the first time.

Q. I see.

A. Part of it, anyway.

[fol. 536] Q. Would you know what hand?

A. Possibly the right hand.

Q. How long was this piece of steel? I think you said.

A. About a foot and a half, and about half an inch around.

Q. Was it a round piece?
A. Yes.
Q. Or nearly round?
A. It was round.
Q. And you hit her on the head, did you?
A. Side of the head.
Q. And about how many times do you think?
A. I ain't sure.
Q. Pardon?
A. I ain't sure.
Q. Well, approximately?
A. Approximately eight times before she quit screaming.
Q. I see. And did that cause her to be unconscious?
A. She still wasn't unconscious.
Q. Did it knock her down?
A. Yes; it knocked her down, but she still wasn't unconscious.
Q. How could you tell she wasn't unconscious?
A. Because she was still trying to get back up.
[fol. 537] Q. Did you hit her any more after that?
A. Yes; I believe I hit her acrosst the forehead, which knocked her out.
Q. When you hit her across the forehead was she up or down?
A. She was in a sitting position.
Q. Now, was that the spot you led the officers to this morning?
A. That is right.
Q. And after you knocked her out did you hit her any more with the piece of steel?
A. No.
Q. And did she appear to be pretending you had knocked her out?
A. I didn't find out.
Q. Now, what did you do after you knocked her out?
A. I stabbed her once or twice.
Q. And where? What part of her body, I mean?
A. I believe it was on the right side and under her left breast.
Q. You mean on her right side and under her right breast?

A. That is right.

Q. And that is two different stab wounds?

[fol. 538] A. As near as I can remember.

Q. Now, was she completely knocked out? You say you knocked her out, when she was in this sitting position you hit her across the forehead with the piece of steel and knocked her out, was she completely out?

A. When I stabbed her?

Q. No, after you knocked her out would she be completely knocked out?

A. She would have to be if she was knocked out.

Q. And, of course, you could have—there was nothing stopping you from getting away from there then?

A. No; but I stabbed her right after I hit her, though.

Q. Well, let me ask you, though: After you hit her, why, she being knocked out; why, she couldn't see you go or——

A. What I am getting at is when I hit her across the forehead, which knocked her out, I then stabbed her right away before I—I didn't know I had stabbed her.

Q. Well, how long after did you stab her?

A. Right at the same time, I just dropped the piece of steel and had the knife in my hand.

Q. And after you stabbed her, what did you do?

A. Covered the body with drift wood.

Q. And anything else?

A. Wiped my finger-prints off the lunch pail.

[fol. 539] Q. And how did it happen that you had had your finger-prints on her lunch pail?

A. Done carried it there for awhile.

Q. Now, after you wiped your finger-prints off the lunch pail with her panties what did you do then?

A. Well, I left.

Q. What did you do with the iron bar?

A. I threw it in the river.

Q. And the knife, too?

A. Yes.

Q. Why did you wipe your finger-prints off the lunch pail?

A. Just a premonition.

Q. Pardon?

A. Just a premonition.

Q. Of what?

A. To wipe them off.

Q. Well, did you feel that would be one way of connecting you with that killing?

A. No; I have been in trouble most of my life, I done learned a long time ago to wipe finger-prints off.

Q. You did think that if your finger-prints were found that would connect you with the killing?

A. That was mostly habit.

Q. I see; but that arose out of your knowledge that your [fol. 540] finger-prints would connect you with the crime?

A. If you want to put it that way.

Q. Well, isn't that true?

A. It is more or less of a habit of mine.

Q. Let me ask you if it didn't become a habit because you thought your finger-prints would connect you with the crime?

A. Well, I learned that a long time ago.

Q. And why did you throw the knife and iron bar away?

A. So they couldn't be found.

Q. Now, after you threw the iron bar and knife in the river, what did you do?

A. I left.

Q. And where did you go?

A. I came over here in Portland.

Q. Well, did you go get that car?

A. I didn't go back to that car.

Q. And by the way, I don't know whether you said what kind of a car you had before you picked her up?

A. 1936 Ford Coupe.

Q. Color?

A. Brown.

Q. Now, you said awhile ago that you had intended on letting her go, assuming she would dummy up, as you put it, [fol. 541] and you were going to leave town, is that what you had in mind when you left there?

A. After I killed her you mean?

Q. Yes, after you killed her and left there?

A. No; I never left town. I stayed in town all the time.

Q. Now, you were later arrested by a police officer?

A. Naturally.

Q. And where was that?
A. I don't know the street.
Q. Well, about?
A. It is on the report.
Q. Pardon?
A. You can get the exact location on the report.

Captain Browne: We haven't got the report in yet.

By Mr. Collier:

Q. At any rate you were taken to the St. Johns Precinct?
A. I was brought down here.

Captain Browne: Was it in St. Johns you were arrested?
Mr. Leland: No; it was across Interstate, on the East Side.

By Mr. Collier:

Q. Are you sure which station you were brought to?
A. I was brought here.
Q. And after being brought here you told the officer that [fol. 542] you wanted to see somebody in the Homicide Squad?
A. Right.
Q. And you also told the officer about killing the girl?
A. That is right.
Q. And then you later told Officer Dan Mitola and Officer Eck about killing her?
A. I took them to it.
Q. Pardon?
A. I took them to the body.
Q. You know Mitola by name?

Captain Browne: Sergeant Mitola.

A. I know him by sight, too.
Q. And do you know Officer Eck?
A. I know him now.
Q. And was he with Sergeant Mitola?
A. He was.
Q. And you told them about it and led them to it, is that correct?
A. Yes; I told them I could lead them to it.

Q. And what route did you take when you took the officer to it?

A. The same route you took when you come down.

Q. I see. Now, as I understand it, the officers did not know—or I will ask you this instead: Had you told the [fol. 543] officers where she was?

A. No, I didn't.

Q. They didn't know anything about where she was?

A. They didn't even know she was dead.

Q. And you led them to the spot?

A. That is right.

Q. There were a pair of glasses found near her body; and you said she was wearing glasses?

A. Yes.

Q. And do you know how those glasses came to be on the ground and not on her?

A. Well, they must have fell off.

Q. Were they on her when you first hit her with the bar?

A. Well, I wouldn't say for sure, but I think they was. If they had been on her, they should have been broken.

Mr. Collier: They are there?

Captain Browne: Yes.

Mr. Collier: Let's see those. (Same are produced.)

By Mr. Collier:

Q. Now, I have here a frame of some glasses, and it's a gold colored frame and with shafts which are curved at a point that would go around the ears. Does that appear to be the frame of the glasses that she had?

[fol. 544] A. Well, all glasses frames are about the same, I would say.

Q. Does it look like it?

A. We will say they are.

(Captain Browne exhibits his own glasses.)

Mr. Leland: Well, you got the new style, but most of them look like hers. Because the glasses could belong to anybody as far as that goes.

By Mr. Collier:

Q. There appears to be a hair clasp (indicating same)—Miss Marlowe, what would you call this?

The Court Reporter: A barrette.

Q. Did she have something like that, similar?

A. I believe she had two of them.

Q. Now, is there anything you want to add to this statement?

A. Not especially.

Captain Browne: I would like to ask him a few questions.

Mr. Cellier: Go ahead.

Questions by Captain Browne:

Q. What was your reason for wanting to kill her?

A. Because, I had no reason at first.

[fol. 545] Q. Well, when you killed her, what made you make your decision that you should kill her?

A. It just come to me (snapping fingers), just the second she started screaming.

Q. Yes, but you said you previously had picked up this bar in case she started screaming?

A. Just to knock her out.

Q. Just to knock her out?

A. That is right.

Q. But you picked up the bar with the intention of using it if she started to scream?

A. If I couldn't quiet her anyway.

Q. Did you make any other attempt?

A. When she started to scream?

Q. Yes.

A. No.

Q. You had the bar for that purpose. When you awakened and she was twenty feet away, was she walking back?

A. No.

Q. Did you call her back?

A. I told her she had better come back.

Q. You told her she had better come back, and then did you pick up that bar of steel then?

[fol. 546] A. Not at that time, not till later.

Q. What was the reason why you didn't want her to scream or to leave you?

A. Because I wanted to wait until that night.

Q. Why?

A. I would go with her.

Q. You didn't want to be seen, did you?

A. That is right.

Q. Well, if you had permitted her to go home you wouldn't have had to go with her necessarily, would you?

A. Well, I would have had to leave the vicinity.

Q. Did she say she was going to tell her mother or the police?

A. She was bound to.

Q. Was that the reason you killed her?

A. No; as I stated a little while ago, the reason I killed her was because she started screaming, I had no intention of killing her originally.

Q. What was your intention originally?

A. What I told you at the first of the story.

Q. Did she see the knife when she first met you?

A. I guess not, because I had it inside my coat at that time.

[fol. 547] Mr. Collier: There is nothing you think of now to add to this statement?

Mr. Leland: Not right now, maybe later on.

(Statement concluded—8:30 a. m.)

* * * * * * *

Morris Leland

[fol. 548] REPORTER'S CERTIFICATE

STATE OF OREGON,
County of Multnomah, ss:

I, Katherine Marlowe, a Court Reporter for the Fourth Judicial District of the State of Oregon, hereby certify that I reported in shorthand notes the foregoing statement of Morris Leland at the time and place and with the parties

present as heretofore set forth; that I subsequently reduced my said shorthand notes to typewriting; that the foregoing 44 pages of typewritten matter constitute a full, true, and accurate transcript of my said shorthand notes; and that the said Morris Leland made the statements therein set forth.

Dated at Portland, Oregon, this 11th day of August, 1949.

Katherine Marlowe.

p. 366
Blank.

Note:

Pages 367 - 398 not entirely legible, but is best obtainable.

PLAINTIFF'S EXHIBIT 18
TO RECORD BUREAU
L-8690?

No. 28 630
Exh. 18
D. Judge
C. [illegible]
RECEIVED

August 11 - 1949
10:00 P.M. Portland
Detective Office

I Swear I shall make a true written without any change or promise of any kind.

I Swear I did on the morning of August. this at about 1936 hrs walk from N. Edison at which I then drove down Fessenden with a saw a girl walking down the street I then stopped the car and followed and then overtaking her on ave st. when I then stopped her and asked her where she was going she stated she was going no where but then stated she was going Barr picking, I told her that she must to come along with me they did so after she was the knife I had in my belt I then took her down by the river where I attempte to rape her which I did not complete do to the fact that she said it hurt her. I then took her with me all day friday on the same. said friday I picked up a piece of steel 18 in long ½ in round with the idea of killing her with it I then took her to spot where the body was found. at said spot we spent the night in a camping saturday morning I found that the age 20 feet from where I was I then told her she must turn back which she did,

About 45 min. later she stated she was going home at which time I decided to kill her. I then picked up the said piece of steel and hit her along side of the head which did not knock her out. I then hit her 6 or 7 more times before she passed out & I stabbed her twice more in the right side and once under her left breast and then covered her body with cloth and left the scene of the crime. This is the way I killed her on the morning of August 6, 1949 at 8:30 in the morning.

This is the true story of the way I killed her.

Prince Leland
August 11-1949
10:15 P.M.

Robert E McKeown
Asst. Attorney Gen

DEFENDANT'S EXHIBIT 19

369

Form 53 K-1
MEDICAL DEPARTMENT, U. S. ARMY
(Revised May 31, 1920)

RADIOLOGIC RECORD

Name Leland, Morris Grade Pvt. Ward - 9 -

Film No. _____

Name Leland Morris Rank Pvt.
Serial No. 39 482 501 Ward 9 Age 18
Part to be examined (or treated) Skull
Clinical diagnosis (including operations) Poss Fracture
Date _____, 19____ Post M. C.
Hospital _____ Film No. X-15 11
Date _____, 19____

No evidence of skull fracture in these films. Stereos however, were not taken. There is an opaque round shadow about the size of a b.b. shot in the region of the maxillary antrum.

ALFRED J. COOPER, MAJOR, M.C.

370

DEFENDANT'S EXHIBIT 20

GOOD SAMARITAN HOSPITAL

PORTLAND, OREGON

X-RAY DEPARTMENT REPORT

Name Master Morris Leland. Date 9-6-33.

Hospital Address S.

No. 54036.

Part Examined Skull;

Findings No fractures or other abnormalities of the skull are visualized in these radiographs.

To Dr. C.E. Morris. Signed Wallace Haworth, M.D.

Note:

Pages 367 - 398 not entirely legible, but is best obtainable.

371

Name Noland- [illegible] Service of Dr [illegible] (W.) Room

Interne Ward

DATE	
48- 33- Sam Regnier of att[illegible] Keeps a subscription of Dr Barnes Rheumatoid arm [illegible] leg- to go further. [illegible] Hosp & stay with [illegible] at present time G.H.Burke	9/13 Negative Lasso X Okay and signed Chas Strickland Name
11-33 Nichols Op [illegible] report shows [illegible] change op Procedure [illegible] left to remain [illegible] to Hosp. until [illegible] motion till [illegible] part of Oct [illegible] week - The family [illegible] there are [illegible] friends	
[illegible] to Hospital [illegible]	

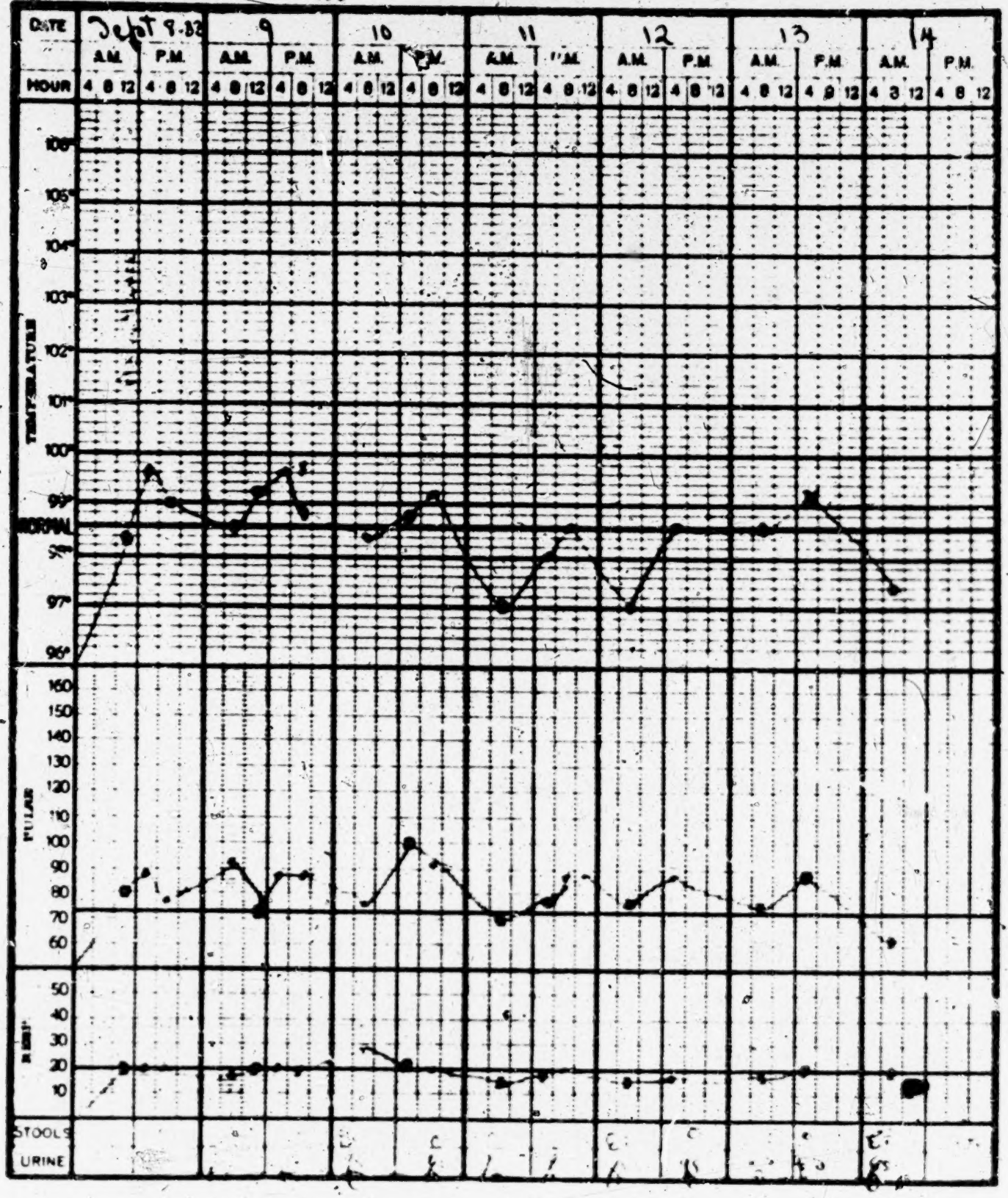
372

372

GOOD SAMARITAN HOSPITAL

GRAPHIC CHART

NAME Leland-Morris-Van Brous W&S 50 CASE NO. R4036



373

GOOD SAMARITAN HOSPITAL
PORTLAND OREGON

PHYSICIAN'S DIRECTIONS

Record No. R4036 Room Ward

Name Leland Morris Attending Dr Evans

PHYSICIAN'S SIGNATURE

ORDERED DATE		DISCONTINUED DATE
	F & fist L & Johnson	
	2 Mist frag	
	3 Rest	
	4 X ray L & Johnson	
	5 Put in Cervibe plaster jacket	
	6 Out-Bed + plaster jacket	
9/10	Diet as tolerated	
9/11	Observation & give care	
9/14	May leave hospital	

Resident Assistant

374

LABORATORY RECORD

GOOD SAMARITAN HOSPITAL

PORTLAND, OREGON

PHYSICIAN Dr Ross

NAME Leland Harris

RECORD NO. 1 4 32

ROOM

WARD 5E

URINE

DATE	COLOR	SPECIFIC GRAVITY AMOUNT	ALBUMIN QUANTITY	REACT	ALBUMIN	SUGAR QUANTITATIVE TEST	SUGAR	DIACETIC ACID TEST	ACETONE	BILE	BLOOD	OCCULT BLOOD	MICROSCOPIC

KIDNEY FUNCTIONS

SPECIMEN No. 1 cc — PHTHALEIN PRESENT

SPECIMEN No. 2 cc — PHTHALEIN PRESENT

BLOOD

DATE	9-1-33	DATE	9-1-33
ERYTHROCYTES PER CU. MM.	5,300,000	LEUCOCYTES PER CU. MM.	11,070
HEMOGLOBIN PER CENT	91%	POLYMORPHONUCLEARS	70%
HEMOGLOBIN GMS PER 100 C.C.	14.56	SMALL LYMPHOCYTES	25%
COLOR INDEX		LARGE MONONUCLEARS	4%
POLYCHROMATOPHILIA		EOSINOPHILES	0%
POIKILOCYTOSIS		MYELOCYTES	
NUCLEATED RED CELLS		TRANSITIONALS	

WILLIAMSON & STANDARD OF HEMOGLOBIN — CHILDREN 12 TO 16 GRAMS PER 100 C.C. MALE ADULT 14 TO 18 GRAMS PER 100 C.C. FEMALE ADULT 12 TO 16 GRAMS PER 100 C.C.

SPECIAL BLOOD

DATE 9-1-33

BLOOD SEDIMENTATION

/ 32

BLOOD GROUPING

AGGLUTINATION TESTS

LABORATORY RECORD

556

Form No 50

INTERNE NOTIFIED - DR.

CASE HISTORY

Record No. R-4036 Dr. C E Brown

Name Linsey, Master Address

FINAL DIAGNOSIS Child in State of Coma resulting from alcoholic poisoning FOLLOW UP RECORD

Case Records report Dec 4-8-33

RESULT: Recovered-Improved-Unimproved-Died

PERSONAL: Age Sex N S. M. W. D. Child Occupation At home

FAMILY HISTORY: Ens negative,

HABITS: At home.

PAST HEALTH: Ens negative

PRESENT CONDITION: Self poisoning Acute Alcoholism accident

PHYSICAL EXAMINATION: HEIGHT WEIGHT NUTRITION Good

TEMP. 99.6 PULSE 88 RESP. 20 BLOOD PRESS. S. Normal

HEAD: (including ear, nose, throat and mouth) None [illegible] ears [illegible] Negative

Eyes dilated [illegible] regular, equal, react to L. & A.

2. CASE HISTORY

376

GOOD SAMARITAN HOSPITAL
PORTLAND OREGON

PHYSICIAN'S DIRECTIONS

2 PHYSICIAN'S DIRECTIONS

Record No. 35990 Room Ward 30

Name Leland, Master Morris Service of Dr. Brous

ORDERED DATE	DISCONTINUED DATE
8/29 1. M. Bus 2. Tap Cl Tray unless Ranitidine 3. X Ray Left [illegible] A.P. & Lateral 4. Urinalysis 5. Codeine Sulf. [illegible]	
8/30 1. Med Tray 2. Enema for bowels if R.N. adv. to Day 3. In Bed.	
8/30 11. To stay in bed in hosp for next 24 hr may stay Dr. Brous per office Clara K. Randall	
8/31 May go home Dr B	

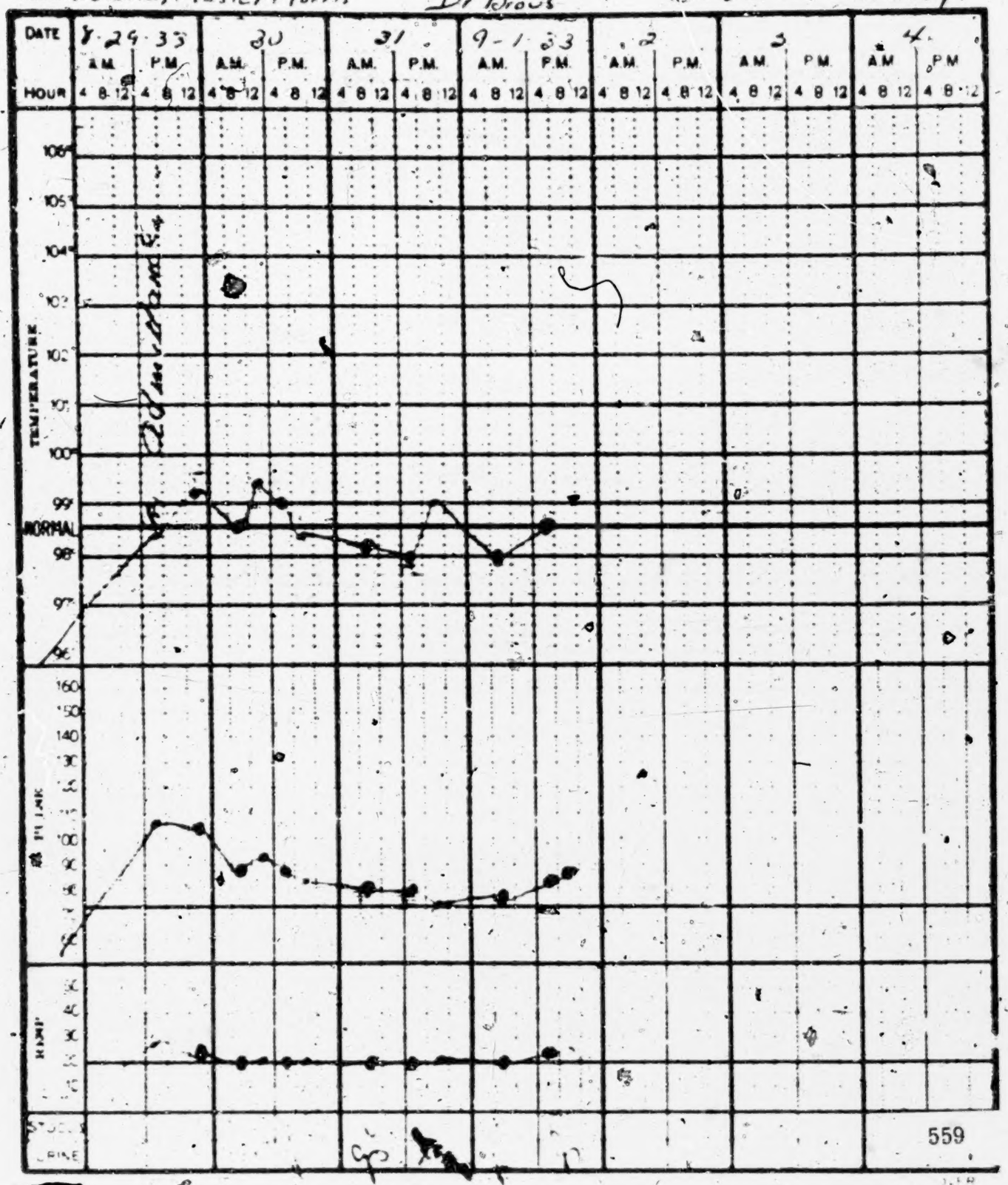
558

Resident Approved Chief

GOOD SAMARITAN HOSPITAL

GRAPHIC CHART

NAME Leland, Master Morris Dr Brous 1950 CASE NO #3879



378

LABORATORY RECORD

GOOD SAMARITAN HOSPITAL
PORTLAND, OREGON

PHYSICIAN Evans RECORD NO A[illegible]

NAME Roland Rollins ROOM WARD 2a

URINE

DATE	COLOR	CLARITY AND AMOUNT	SPECIFIC GRAVITY	TEMP	ALBUMIN	ACETONE AND DIACETIC ACID	SUGAR	DIASTASE UNITS	BILE	BLOOD	MICROSCOPIC
8-31-33	Amber	clear	1.030		Negative		Negative				Occasional epithelial cells, no pus, blood or casts

KIDNEY FUNCTION

	PHENOLSULPHONPHTHALEIN PERCENT
	PHENOLSULPHONPHTHALEIN PERCENT

BLOOD

DATE 8-30-33		DATE 8-30 33	
ERYTHROCYTES PER CU. MM.	4,180,000	LEUCOCYTES PER CU. MM.	11,200
HEMOGLOBIN PER CENT	83	POLYMORPHONUCLEAR NEUTROPHILES	62%
HEMOGLOBIN GRAMS PER 100 C.C.	14.11	SMALL LYMPHOCYTES	31%
COLOR INDEX		LARGE MONONUCLEAR	3%
PRICHARD-TYPE A		EOSINOPHILES	
PRICHARD-TYPE B		BASOPHILES	
MYELOCYTES		MYELOCYTES	
YOUNG FORMS		YOUNG FORMS	
		JUNCTIONALS	
		TRANSITIONALS	

WELLS-HUMMER'S STANDARD OF HEMOGLOBIN: MALE: 13 TO 15 GRAMS PER 100 C.C. AVERAGE 14.5 GRAMS PER 100 C.C. FEMALE: 12 TO 14 GRAMS PER 100 C.C.

SPECIAL BLOOD

	DATE 8-30 33
COAGULATION TIME	
BLEEDING TIME	
BLOOD PLATELET COUNT	
HEMOLYSIS TIME	1.0 x

BLOOD GROUPING MOSS CLASSIFICATION

GROUP I	
GROUP II	
GROUP III	
GROUP IV	

AGGLUTINATION TESTS

DATE	PARA A	PARA B

LABORATORY RECORD

PROGRESS RECORD

Name Leland Master Record No. 3[illegible]

Service of Dr. Brown Room

Interne Ward

DATE	N. B. FREQUENT PERIODICAL NOTATIONS SHOULD BE MADE OF RELEASE ON PROGRESS OF CASE CONDITIONS ETC.	DATE
4/2	Chest x-ray and urinalysis ordered by radiologist. Report on X-ray and urinalysis received.	
4/4	Chest x-ray negative. Urinalysis negative.	

380

GOOD SAMARITAN HOSPITAL
PORTLAND, OREGON

X-RAY DEPARTMENT REPORT

Name Master Morris Leland Date 9-29-33

Hospital Address 50

No. R3899

Part Examined Left femur and left lowerleg.

Findings

No fractures are present in the left femur.

No fractures are shown in the left tibia or fibula.

To Dr. [illegible] Gross Signed Dr. [illegible]

562

[illegible] no pain on chest
No rales, lungs excursion normal
No painful areas on pressure

HEART (circulatory system) Sounds normal

ABDOMEN: No painful areas over
no enlargement of liver or spleen
palpated

GENITO-URINARY: (including female pelvis) Not inspected

NEURO-MUSCULAR: Normal

SKIN: Many traumatic crush burns and
hemorrhagic areas upon back
R arm, R leg & left foot & leg

SPECIAL EXAMINATION:

TENTATIVE DIAGNOSIS: Trauma to body (auto
accident)

Date 5/24/37 Examined by [illegible]

382

CASE HISTORY

Record No. A 13897 Dr. Brown

Name Leland Ha... Norris Address 117 2 Br... City

FINAL DIAGNOSIS Traumatic Polyneuritis FOLLOW UP RECORD Date 8/31/33

RESULT: Recovered-Improved-Unimproved-Died

PERSONAL: Age 6 Sex M S. M. W. D. S Occupation N Home

FAMILY HISTORY: F & M Living [illegible]

HABITS: [illegible]

PAST HEALTH: [illegible]

PRESENT CONDITION:

PHYSICAL EXAMINATION HEIGHT WEIGHT NUTRITION [illegible]

TEMP. 99 PULSE 96 RESP. 20 BLOOD PRESS. S. D. P. T.

HEAD: (including ear, nose, throat and mouth) Eyes negative - fully [illegible] tongue coated [illegible] & [illegible] enlarged [illegible] negative [illegible] Romberg's [illegible]

564

7 CASE HISTORY

Note:

Pages 367 - 398 not entirely legible, but is best obtainable.

[illegible] breath [illegible] no rales. [illegible]

HEART: (vascular system) [illegible]

ABDOMEN: No abnormal masses found. No viscera or tenderness. Liver & kidneys not palpable.

GENITO-URINARY: (including female pelvis) testicles descended. External genitalia O.K.

NEURO-MUSCULAR: No abnormalities found. Reflexes present - and shows no [illegible]

SKIN: O.K.

SPECIAL EXAMINATION: X-Ray of skull negative

TENTATIVE DIAGNOSIS: Myocarditis & chronic tonsil V.S. [illegible]

Date [illegible] Examined by M.E. Green

565

DEFENDANT'S EXHIBIT 23

Morris Leland #15010: Examined 2-17-44
Name and relationship of person giving history.
Harold S. Leland. father - 2-20-44.

#1. Morris Leland.
#2. 542-24-5243
#3 17 years - B. Portland Oregon.
#4. 17 years
#5. Oregon
#6 no
#7. None.
#8. father is a truck driver
#9. I tried to interest Morris in Religious matters, and asked him to go to Sunday School numerous times, but he refused.
#10. A. no. B. no. C. no D. no E. no. F. we drink an occasional glass of beer.
#11. To the best of my knowledge the above answers apply here.
#12. Morris has four brothers, and Two sisters alive, one brother, James, died at the age of five months, pneumonia. None had any mental peculiarities, nor have any of them been engaged in anything criminal, nor have they been confined in an institution
#13. patient has none
#14. Mother was in perfect health.
#15. Morris had no peculiarities, until he was hit by car.

Page #2.

#16. Whooping Cough. Measles, Chicken pox.
#17. Morris was slow to learn, the school authorities, wanted me to have him examined several times. But Morris resented this very much, and refused to submit to an examination. As a last resort they transfered him to Sabin School, from which he graduated at the age of sixteen.
#18. No.
#19. No.
#20. After Morris finish'd his studies at Sabin, he didnot show any interest in life, anymore than he wanted to run the streets all nite, come home at five or six in the morning, and sleep all day. He became very angry with me, when I told him he would either have to go to work, or go onto high school.

He had five or six jobs, in less than a month, but was not satisfied with any of them, and quit at the slightest excuse.

#21. Not married.
#22. Only those childhood diseases noted above.
#23. When Morris was appro. 5½ years old, he was struck by a ¼ ton panel delivery truck and knocked about 30 ft, driver of truck was under influence of drink, and lost control of truck.

#23. Cont. With Morris laying prone on ground, ahead of him, the Ice driver, then drove rite front wheel of truck over Morris' head. Morris was taken to hospital and kept under observation for some time.

However, as the Doctor explained to me an accident of this kind, might go on for a long time, before anything might develope from it, and as he had suffered no apparent injuries he was released from hospital.

#24. I don't believe Morris drunks any, but I do know, that lately Morris has been taking Aspirine tablets, one after the other, complaining of headaches all the time.

#25. No.

#26 + #27. Do not apply to Morris.

#28. No.

#29. Morris was confined in County jail for appro. 30 days, for car theft 4 July 1943.

#30. When Morris was about eight year old he began acting rather strange to say the least, for one thing, he liked to torment and hit his younger brothers, and when corrected he would deny that he did.

He also aquired the habit of stealing very young, when he was about nine years old, he took eleven dollars from

38

Page # 4.

#30 Cont. a service Station, and another time he broke into a house, and took some canned fruit, at no time, would he ever admit his guilt, even when caught dead to rights.

At different times, he has stolen money, from his mother and I, at these times, he would stay away, until all his funds were gone, and then return, home, and would deeply resent, any effort on our part to talk with him about it.

It is my sincere belief that the cause of Morris trouble, is the above mentioned accident.

#31. Morris seemed to be a healthy boy, but lately, he was inclined to be careless of his appearence

#32. Morris slept good, ate hearty. His weight stayed about the same -

#33. I have never heard Morris threaten any one, However, he had an idea that he was tough, and that people had better leave him alone.

#34. When we would try to correct him there were times, when he threatened to drown himself.

#35. It is my belief, and I hate to say it, that Morris, is just lazy, down rite lazy and will do anything to keep from work

Page #5.

#36. Father Jos. Name, Co. Feb. 11. 1898
#37. [illegible] Nov. 26. 1926
#38. A. See #36. B. [illegible] Portland Ore
#39. Miss H W. Means 1807 N. Williams Ave Portland Ore
[illegible] Ga. 6930. - (Friend)

P.S. Sorry the forms you sent me, was soiled by the little folks, so drew pencil lines. The answered to your questions in this form. In closing, I wish to assure you of my full support, and I hope that Morris, can be made a useful citizen, and a credit to his Country.

My work keeps me away from home about 14 hours every day, and when I do get home, I am very tired, and must go right to bed [illegible] Morris would have happened, had I had more time to spend with Morris. —

Yours Truly

Harold J. Leland
2726. N. Gantenbein Ave
Portland Ore

phone W.E. 1253.

OREGON STATE HOSPITAL

Form 19—3M—7-40

CONTINUED NOTES

Name Morris Leland. Mult. Feb. 17, 1944 *Number*

Notes on admission:

Patient quiet and cooperated fairy well when rec. Appeared somewhat depressed and not inclined to give any informaton about self. Bathed and put to bed without any difficulties. Patient remained quiet and orderly during the night.

Age 17? Common school. Catholic. No special occupation- shipyards of late. Pt. Born in Oregon. Patient was arrested on a rape charge and sent to the hospital for mental observation. - F.K.

Discharged 4-24-44

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Form 139

OREGON STATE HOSPITAL

Record of Examination on Admission

Case No. 15010 Name Morris Leland Cooperation Fair

Date admitted Feb. 17, 1944 Date examined Feb. 21, 1944 Reliability Fair

Age 17 Weight 153 Height 5' 8"

PAST HISTORY

DISEASES: Chickenpox Smallpox Diphtheria Measles Mumps Influenza Tonsilitis

Chorea Rheumatism Pleurisy Pneumonia Malaria Scarlet Fever Typhoid Fever

T. B. Ca.

INJURIES - OPERATIONS -

HEAD: Headache Occasionally

EYES: Glasses - Failing vision - Inflammation - Pain -

EARS: Loss of hearing Normal Pain - Discharge -

NOSE: Head colds Seldom Discharge - Epistaxis -

TEETH: Dental condition fair

CARDIO RESPIRATORY: Pain in chest - Palpitation -

Dyspnea - Cough Seldom Hemoptysis -

Edema - Ear ringing - Spots in vision -

Vertigo - Fainting -

GASTRO INTESTINAL: Habits of eating Fast Appetite Fair

Nausea - Gas - Vomiting -

Hematemesis - Colic - Icterus -

Diarrhoea - Constipation - Hemorrhoids -

Stools Normal

GENITO URINARY: Dysuria - Hematuria - Pyuria -

Retention - Incontinence - Frequency Normal Nocturia Seldom

Syphilis - G. C. - Soft Chancre -

GYNECOLOGICAL HISTORY: Menses began Regular Duration

Amount Pain

Date of last menstruation

Leucorrhea—Began Amount Color Irritation

Married at Years Husband's name Health

Children—No. Oldest Youngest Labors

Puerperiums

Lactation

Miscarriages—No. Time Cause Recovery

Menopause—Age Type Symptoms

WEIGHT: 153 Best about same Loss or gain Rapid or gradual

SPECIAL REMARKS:

572

PHYSICAL EXAMINATION

General observation Well nour shed
(Activity, responsiveness, build, development, nutrition)

Skin Clear
(Color, bruises, scars, pigmentation, scaling, jaundice, moisture, texture, eruptions)

Head Symmetrical — Facies
(Shape, symmetry, depression, scars, tenderness) (Symmetry, expression)

Scalp Clear
(Bruises, alopecia, condition of hair, scars)

Eyes Negative
(Sclerae, photophobia, lacrimation, diplopia, conjunctivitis)

Ears Neg
(Anomalies, discharge, tophi, hearing) (Obstruction, perforation, discharge, deformities)

Mouth Dental condition poor
(Breath, teeth, gums, leadline, pyorrhea, tongue, mucosa, vault)

Lips Normal
(Color herpes, ulcerations, fissures)

Throat Neg.
(Palate, tonsils, pharynx, injection, exudate)

Neck Normal
(Thyroid, bruits, thrills, pulsations, lymph glands, tracheal tug, scars)

Chest Negative
(Respiratory rate, shape, symmetry, deformity, fossae, varices, rosary, lag, retraction, expansion)

Breasts
(Tenderness, tumors, scars, size, pigmentation, nipples)

Lungs Normal
(Fremitus, dullness, flatness, breath sounds, rales, rubs, diaphragmatic excursion)

Heart Regular
(Thrill, cardiac shock, apex beat, arhythmia, boundaries, shift, murmurs)

(Distribution, radiations, bruit, accentuations, reduplications)

Pulses 70
(Equality, rhythm, synchrony, rate, walls, capillary pulsation)

Blood pressure 102/80
(Systolic, diastolic, pulse pressure)

Adbomen Normal
(Shape, symmetry, distention, scars, striae, tympany, masses, spasm, pulsations, peristalsis)

(Tenderness, fluid, hernia, caput medusa, varices)

Liver Normal — Gall Bladder — Kidneys
(Size, borders) (Palpable, tenderness) (Palpable, movability)

GENITALIA (Male) Normal
(Scars, discharge, epididymis, hydrocele, varicocele, tenderness)

Extremities Neg.
(Edema, cyanosis, stasis, deformity, clubbing, pigmentation, scars, nails)

Spine Neg
(Kyphosis, lordosis, scoliosis, rigidity, tenderness)

Joints, bones Neg.
(Swellings, tenderness, ankylosis, deformity, nodes)

Glandular system Neg.
(Neck, axillae, groin, epitrochlear)

Rectal Neg.
(Hemorrhoids, masses, prostate, bleeding, fissures, fistulas)

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Perineum ..... (Multiparous, laceration, repair, varices) Vagina ..... (Discharge, laceration)

Uterus ..... (Cervix, position of body, discharge, ulcer, growth, tumor of body)

Ovaries ..... Tubes .....

Fossae ..... (Masses, tenderness, spasm)

Special remarks: .....

NEUROMUSCULAR EXAMINATION

General ..... (Gait, ataxia, movements, tremor, spasticity, flaccidity)

..... (Paralysis, speech defect, Romberg, coordination, dermatographia, sweating)

Muscles ..... (Atrophy, strength, symmetry, twitchings, claudication, hypertrophy, wrist drop, toe drop)

Sensation ..... (Hyperesthesia, anaesthesia, paraesthesia, temperature sense, tenderness over nerve trunks, adiadokokinesis, astereognosis)

Reflexes ..... (Pharyngeal, biceps, triceps, periosteal, abdominal, epigastric, cremasteric, knee, ankle, plantar, Babinski phenomena, clonus)

Cranial nerves .....

I ..... (Smell, discrimination)

II ..... (Hemianopia, acuity, contraction of fields, color)

..... (Ophthalmoscopic examination)

III-IV-VI ..... (Movements, strabismus, nystagmus-direction, ptosis, pupils, size, outline, reaction, consensual and sympathetic reflexes)

V ..... (Corneal reflex, tenderness, taste, sensation, mastication)

VII ..... (Facial symmetry, naso-labial folds, tremor, atrophy, test phrases)

VIII ..... (Hearing, vertigo)

IX-X-XI ..... (Swallowing, phonation)

XII ..... (Movement of tongue, deviation, tremor, atrophy)

1-20-44 FLUOROSCOPIC AND X-RAY DEPARTMENT 393

Morris Leland: Some scarring in left apex. Otherwise chest negative.

PATHOLOGICAL DEPARTMENT

Date

Ward No.

Doctor

Tissue or fluid

When removed

Clinical diagnosis

Findings

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Form 180—XM—12-41

OREGON STATE HOSPITAL

WARD ADMISSION RECORD.

15010

Name Morris Leland County Mult Ward C

Admitted Feb. 17, 1944 19 at 6:05 M. Bathed at 6:10 P M.

TENDENCIES: HOMICIDAL VIOLENT SUICIDAL DEPRESSED

Condition of Person: (General Nutrition, Cleanliness, Vermin, etc.)

Fairly well nourished- Fairly clean.

Skin: (Marks, Bruises, Scars, Skin Diseases, Eruptions and Locality)

Physical Disorders: (Deformities, Ruptures, Fractures, Dislocations, etc.)

Quality and Condition of Clothing Indifferent qua ity in fairly clean condition.

Articles Found on Person Taken care of by Mr. Batson, if any.

FORWARD THIS REPORT TO OFFICE

dw. briggs, ATTENDANT

STATE PRINTING DEPT

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FORM 14 SM 6-43

OREGON STATE HOSPITAL

NAME Morris Leland DATE Feb. 17 1944 CASE NUMBER

WEIGHT

YEAR	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPT.	OCT.	NOV.	DEC.
1944		153	151	155								

MENSTRUATION

STATE PRINTING DEPT.

OREGON STATE HOSPITAL

CLINICAL HISTORY

Name Leland, Morris No. 18010 Date Feb. 17, 1944

Feb. 18, 1944: NOTES BY THE ADMITTING OFFICER. Patient quiet and cooperated fairly well when received. Appeared somewhat depressed and not inclined to give any information about self. Bathed and put to bed without any difficulties. Patient remained quiet during the night. F.K.

INFORMATION FROM THE COMMITMENT PAPERS.
No commitment received. Court Order from Multnomah County, Portland, Oregon.

PERSONAL HISTORY.
Admitted to the hospital by a Court Order. Patient states that he was committed because he was charged with having raped a woman. He says that he had been previously arrested for stealing cars and had been paroled, that his parents live at 2726 N. "Kelurbine" Street and that his father, whose initials are H. S., works at odd jobs and that he himself reached the eighth grade at sixteen years of age, that he worked for three months in the Albina Shipyards as a pipe fitter's helper, that he then secured a clearance and quit the Albina Yard, going to another yard where he worked for a few days. For the past two months he has been entirely idle, as he says "just fooling around town". His description of his difficulty is as follows: "I stole a car. Was riding out in the St. Johns District about two o'clock in the morning when I saw a woman walking along the street. I had a gun in my pocket. I got out of the car and approached her. The woman did not seem scared but suggested that we go down in the park. We went down in the park where he had sexual intercourse, the woman having suggested this." States that the woman had one dollar and that she gave it to him. Thus he rambles on, vaguely attempting to rationalize his offense. He admits frankly that his purpose and intention was to "stick her up". He has no explanation for being at St. Johns at that time in the morning.

MENTAL STATUS.
His attitude is one of complacency. He is fully oriented, admits his misconduct with no showing of embarrassment. Denies hallucinations of any sort. In an effort to test his sensorium he fails in every simple effort in mathematics, has no information on general subjects, cannot name the capital of any five states, cannot bound the State of Oregon but makes surprising response to certain abstract questions. On the whole he impresses the examiner as being a mentally deficient individual who is entirely antisocial and a fit subject for custodial care. Further observation will be required before a diagnosis can be made. In the meantime he will be carried with the provisional diagnosis of mental deficiency.

PROVISIONAL DIAGNOSIS: Mental deficiency.

REVISED DIAGNOSIS:

FINAL DIAGNOSIS: 234. Mental deficiency without psychosis. BEW S

Feb. 21, 1944: Patient, who has long been a problem child, shows behavior disorder. The mother contributes this to a head injury sustained at six years of age. There is little by way of information as to the character or extent of this injury and it would appear probable that as he grew older and his impulsive behavior became

Sheet No.

OREGON STATE HOSPITAL

CLINICAL HISTORY

Name [illegible] No. 15010 Date

Continued from sheet #1:

prominent, the head injury was put under as the basis for his misconduct. Neurologically there is nothing to be observed which suggests organic change. In observation he displays nothing that could be regarded as psychotic. That he may prove to be a constitutional psychopath is admitted but it would seem that this disorder is based more upon mental deficiency. He has shown an IQ below 80 and is definitely criminalistic in his trend. It would seem improbable that anything by way of psychotic elimination or supervision would be serviceable. He understands the character and nature of his conduct and is within the meaning of the law.

RFW S

Feb. 23, 1944: This patient was today presented at staff meeting, he was admitted on a court order from Multnomah County. This 17 year old boy was taken into custody for rape, is complacent regarding his predicament, related his act of stealing a car, seeing and approaching a woman who he states suggested they go to the park where she gave him a dollar. Mother gives the history that he was a normal child until six years of age when he was run over by a car after which time he became a problem child, has been before the juvenile court once previously and was placed in a school for problem children. Upon reviewing this case it was the decision of the staff to classify him as a constitutional psychopath without psychosis.

NS

April 24, 1944: Full discharge granted this day and going to Portland Oregon. Condition, not insane.

Monroe Leland - Portland -

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SNEDDENS VOCABULARY TEST

X	A	B
1. Happy	1. Talk - "	1. Gentle +
2. Tall	2. Patience +	2. Comical +
3. Short	3. Cheerful +	3. Quarr[illegible] +
4. Nervous	4. Bashful +	4. Strict +
5. Kind	5. Stubborn +	5. Active +
	6. Sullen + ?	6. Sympathetic + "
	7. Wasteful +	7. Generous + "
	8. Modest - "	8. Efficient +
	9. Mannerly - "	9. Vigerous +
	10. Easygoing =	10. Timorous
	11. Indolent =	11. Credulous
	12. Amicable =	12. Judicious
	13. Brusque	13. Capricious
	14. Phlegmatic	14. Introspective
	15. Fastidious	15. Sanguine

C	D	E
1. Joy +	1. Strength	1. Quiet
2. Tardiness +	2. Careful	2. Pleasant
3. Regret +	3. Mournful	3. Tricky
4. Bravery +	4. Independent	4. Studious
5. Violence +	5. Cheery	5. Promptness
6. Firmness +	6. Polite	6. Blunt
7. Solitude	7. Jealous	7. Serious
8. Exaggeration +	8. Obstinate	8. Malice
9. Earnestness +	9. Tolerant	9. Mimic
10. Jollity	10. Directness	10. Energetic
11. Rashness	11. Petulant	11. Pert
12. Elation	12. Pompous	12. Seclusive
13. Irony	13. Egotistic	13. Callous
14. Rakishness	14. Dogmatic	14. Euphoria
15. Avaricious	15. Paranoid	15. Meticulous

Number of words correctly defined (liberal) ----------
Number of words correctly defined (strict) ----------

M.A. 17-3 / C.A. 17 = 14 = I.Q. ____

M.A. 17 / C.A. 140 = I.Q. 81

Remarks regarding the test as to satisfactory as to result or not reflecting true I.Q. estimate

Name [illegible] Age 12 School achievment 8th Grade

Examiner

580=581

[fols. 582-583] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1951

No. 176

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed October 31, 1951

Appellent adopts for his Statement points upon which he intends to rely in his appeal to this Court the points contained in his Assignment of Error heretofore filed. This Statement is filed pursuant to Rule 13, Paragraph 9 of this Court.

T. H. Ryan of Ryan & Pelay, Attorneys for Appellant.

I, T. H. Ryan, one of the attorneys for Appellant herein, hereby certify that I served a copy of the foregoing Statement of Points to be Relied Upon by Appellent on the attorneys for the Appellee, State of Oregon, to-wit: John B. McCourt, District Attorney for Multnomah County, Oregon, and George Neuner, Attorney General for the State of Oregon, by mailing a duly certified copy of the same to them through the United States Post Office, Portland, Oregon, properly addressed and postage prepaid. Said service being made on the 29th day of October, 1951.

T. H. Ryan of Ryan & Pelay, Attorneys for Appellant.

[fol. 584] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 176

[Title omitted]

STIPULATION AS TO PRINTING—Filed November 15, 1951

The parties to the above entitled cause hereby Stipulate that the following parts of the record should be printed by the Clerk of the Supreme Court:

Motions by Mr. Ryan commencing on Line 2, Page 5, "Mr. Ryan . . ." to bottom of Page 8.

Motions by Mr. Ryan commencing on Line 2, Page 28, "Mr. Ryan . . ." to end of ruling by Court, ending "alleged confession was given".

Opening statement by Mr. Ryan commencing on Page 33 in the middle of the page, "Mr. Ryan . . ." to "we don't have that information" on the same page.

Opening statement by Mr. Ryan on Page 38, commencing on Line 5, "these facts . . ." to line 10 ending "are somewhat true".

Testimony of Dan J. Mitola, commencing at top of Page 40 and ending at Page 43, "witness temporarily excused;" beginning at top of Page 49 and ending at Page 53, "Mr. Ryan: That is all.", beginning at top of Page 84 down to bottom of Page 118, "witness excused."

All the testimony of Chester Wiles, commencing at the top of Page 44, down to the bottom of Page 48, including, "Mr. Collier: All right;" commencing at Line 9 of Page 55, "Mr. Collier: Mr. Reporter" down to and including, "Mr. Ryan: That is all." at the bottom of Page 83.

Testimony of Court Reporter Marlowe, commencing on Page 133, Line 7, "Mr. Collier: Please mark" to end of witnesses testimony on Page 134.

[fols. 585-586] All the testimony of Captain William D. Browne, commencing on Page 135 and ending at Page 181, at, "The Court: That is all."

Testimony of witness Robert C. McKeown, commencing on Page 196 to and including end of testimony on Page 223.

Testimony of witness W. H. Rydalch commencing on Page 207 to end of testimony on Page 208.

Testimony of witness Jean Orr commencing on Page 209 to end of testimony on Page 210.

Motions for mistrial by Mr. Ryan commencing on Page 250 to end of motions at end of the first paragraph on Page 253 ending "That is my motion for mistrial".

All of the testimony for the defense and the rebuttal of the State from Page 255 to end of trial on Page 448.

Instructions of Court commencing on Page 452 to and including the following: "The Court: I will allow an exception" in the middle of Page 472.

The following requested instructions of defendant:

Instructions 11 and 13 on Page 480.
Instructions 15 and 16 on Page 481.
Instructions 18, 19 and 20 on Page 482.
Instructions 23 and 24 on Page 483.
Instruction 26 on Page 485.
Instruction 31 on Page 488.
Instruction 34 on Page 489.
Instruction 53 on Page 501.
Instruction 54 on Page 502.

There should be included in the record Exhibits 15 and 18, which are the written confessions of the defendant, as an appendix thereto: Exhibit 19, that portion of medical record of U. S. Army bearing on discharge and X-ray showing clouded skull area; Exhibit 20, Good Samaritan Hospital record; Exhibit 23 State Hospital record.

Dated at Portland, Oregon, this 13th day of November, 1951.

Thomas H. Ryan, of Counsel for Appellant. Charles Eugene Raymond, Esq., of Counsel for Appellee.

[fol. 587] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 176

[Title omitted]

ORDER—October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(8761)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,

Appellant,

vs.

THE STATE OF OREGON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

BRIEF OF APPELLANT

THOMAS H. RYAN,
ANTHONY PELAY, JR.,
JOHN D. RYAN and
HAROLD L. DAVIDSON,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,

Appellant,

vs.

THE STATE OF OREGON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

BRIEF OF APPELLANT

Opinion Below

The opinion of the Supreme Court of the State of Oregon is reported in 190 Oregon 598; 227 P (2nd) 785. The denial of the petition for rehearing is found in the Journals of the Oregon Supreme Court for February 28, 1951, noted as a memorandum decision in 52 Oregon Advance Sheets, Volume 8. Said denial for the petition for rehearing was not reported.

Jurisdiction

The judgment of the Circuit Court of the State of Oregon for the County of Multnomah, sentencing the appellant

to death, was argued on appeal before the Supreme Court of the State of Oregon on October 4, 1950, and affirmed on February 7, 1951. The petition for rehearing was denied on February 28, 1951, and thereafter an appeal was taken to the Supreme Court of the United States, the same having been filed after an appeal was allowed by the Supreme Court of the State of Oregon. The Supreme Court of the United States noted probable jurisdiction and granted a motion to procede in *forma pauperis,* on October 8, 1951. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257, based particularly on Subdivision 2 of said Section 1257.

Question Presented

The question presented by this appeal is whether or not the Supreme Court of the State of Oregon in its decision recorded in 190 Oregon, page 598, 227 Pac. (2nd) 785, erred as follows:

ASSIGNMENT OF ERROR NO. ONE: In upholding the validity of the Oregon Statutes regarding proof of insanity, despite defendant's contention that said statutes, 26-929 and 23-122, O.C.L.A., deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment of the United States Constitution in that defendant was required to prove he was insane beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as defense to the crime.

ASSIGNMENT OF ERROR NO. TWO: In upholding the refusal of the trial Court to make available to defendant's counsel before trial the confession taken from the defendant before he was advised of his right to be represented by counsel before he was taken before a Magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by

the 14th Amendment of the Constitution of the United States.

ASSIGNMENT OF ERROR NO. THREE: The Court erred in sustaining defendant's conviction of a sentence to death in the lethal chamber.

Statement of Facts

The defendant, Morris Leland, 22 years of age, was convicted of murder in the first degree and sentenced to death in the lethal chamber, the jury having failed to recommend leniency. In due course appeal was taken to the Supreme Court of the State of Oregon, which Court affirmed the judgment of the trial court. From said holding an appeal was taken to the Supreme Court of The United States of America. Probable jurisdiction was noted, and permission to proceed in *forma pauperis* granted.

The following is a summary of the points raised in the appeal to the Supreme Court of the State of Oregon:

Error in refusing a postponement of the trial date as requested by defendant. (Assignment of Error No. 1 below.)

Error in refusing to allow defendant's motion to examine defendant's confession made before defendant had preliminary hearing or was represented by counsel. (Assignment of Error No. 2 below.)

Error in excusing jurors who had conscientious scruples against capital punishment, although under Oregon law, the jury in effect has the sentencing power in their right to make or withhold a recommendation of mercy. (Assignment of Error No. 3 below.)

Error in the judge's commenting on parole possibility in answer to juror's question. (Assignment of Error No. 4 below.)

Error in introducing irrelevant and cumulative evidence calculated to inflame the passions and prejudices of the jury. (Assignments of Error Nos. 6, 8, 10, 11 and 15 below.)

Error in introducing confessions of defendant which were taken before he was advised of his right to counsel or given a preliminary hearing. (Assignments of Error Nos. 5, 7, and 9 below.)

Error in admitting certain improper testimony. (Assignments of Error Nos. 12, 13, and 14 below.)

Error in permitting improper and inflammatory argument by the State. (Assignment of Error No. 18 below.)

Error in failing to allow certain motions for mistrial. (Assignments of Error Nos. 17 and 18 below.)

Error in refusing to withdraw certain questions from the jury, based on the State's failure to sustain the burden of proof regarding willfulness and premeditation. (Assignment of Error No. 16 below.)

Error in several matters in the instruction of the jury. (Assignment of Error No. 19 below.)

A full statement of the facts of this case requires a review of certain events in Morris Leland's life. In 1933, at the age of six years, he was involved in an automobile accident in which he received a severe head and brain injury (Tr. 173 et seq.). The child was taken to the Good Samaritan Hospital, in Portland, where he was treated for the injuries sustained. He was released in a few days and returned to his home. Approximately two weeks later his parents became concerned about his behavior and sought further medical treatment for him. The doctor ordered his return to the hospital and a psychiatrist, Dr. Burkes, was consulted. The microfilmed records of the Good Samaritan Hospital disclose that this child suffered a *personality change*. This record of his treatment made eighteen years ago was introduced and received in evidence as Defendant's Exhibit No. 20.

The seriousness of this dislocation of defendant's personality and mental health can best be appreciated by considering the fact that his parents paid for hospitalization

and psychiatric treatment. Only a grave condition could compel these people in the middle of the depression to sacrifice their own and their other children's welfare by this considerable expenditure. Bear in mind, that at this time, as at all other times, the Lelands were poor and burdened with the support of a large family.

The terrible consequences of this accident include the crime charged herein. This crime is the climax of a story of tragedy that started from defendant's *personality change*. For, from that time forward, the evidence conclusively shows that Morris Leland was different. And the word "different" sums up the situation more completely than any other description of his condition. (See Tr. 177 et seq. Clara Lolk; 185 et seq. Harold Leland, his father; 250 et seq. Maud Leland, his mother; 256 et seq. Irma Ness; and 264 et seq. Georgina Inghram.)

These witnesses testify that after this accident defendant was sullen, introspective, and lacked the personality and mental powers of a normal child. Typical of their testimony is the statement of Mrs. Ness found on page 262 of the transcript:

> "Well, my opinion is that *he is not normal in no way at all.*"

Or Mrs. Inghram's testimony on page 264:

> "* * * and he never did come around the children to be actually playing. *I never did see him smile.* And that was my experience with the child. *He just wasn't a normal, sane child* * * *"

Or Mrs. Lolk's testimony on page 179:

> "Well, he seemed to be such a pitiful boy; that is one reason why. *He wasn't—well, I would say that he just wasn't all there:* * * *

And on page 183:

"He just looked dull, *duller than any of the other children.*"

Or on page 184:

"Well, *I feel that the boy was not in his right—was not in his right mind* when he was little."

His mental illness was further manifested by his poor progress in school, his involvement in petty criminal activity at the early age of seven or eight, and his general inability to respond normally to even the problems of childhood. As he grew older he engaged in more serious offenses, car thefts, larcenys, and finally, in his early teens, crimes of sex. He was unable to retain employment. He lived like an animal, sleeping during daylight hours and prowling at night. When he slept at home he refused to sleep in a bed, but insisted on sleeping on the floor near a stove. He would fly into fits of anger; and his story is replete with attacks on members of his family, including his mother. This, though the family made every effort and sacrifice to solve the problem caused by his insanity. At one time he attempted to burn the family home. Another time he committed a criminal assault on an older woman, a friend of the family.

Finally, when only sixteen, he committed a crime which resulted in his being examined by a psychiatrist. This crime, a rape at the point of a gun on an older woman and a complete stranger, was too inexplicable that it was not treated as a punishable offense. Instead, he was, at the recommendation of the examining psychiatrist, sent to the Oregon State Hospital for the Insane for observation.

Dr. Haskins, now Chief Psychiatrist at the Veteran's Hospital, Roseburg, Oregon, found this boy unable to determine right from wrong, and he further found that if he received proper treatment he might possibly be helped and his

condition alleviated. He recommended that he be treated by the State Hospital (Tr. Page 270).

Unfortunately, the State Hospital at this time was inadequate. It was overcrowded, understaffed, and the authorities there used this lack of facilities as an excuse for turning loose on the public this known and mentally ill sex offender. This tragic negligence by the State of Oregon, permitted a continuation of the past conduct which finally resulted in the crime here charged.

Subsequent to this defendant committed further and continued offenses. He was several times in custody. He was eventually inducted into the army and while there again came to attention of medical men. He was given a discharge from the army because of his mental condition and received a pension from the Veteran's Administration based on an aggravation caused by another head injury suffered while in the army (Def. exh. 19).

This exhibit is further significant in that the X-Ray report contained therein shows that there is a clouded area in the skull of defendant.

Thus, in August, 1949, sixteen years after the beginning of this story, the stage was set for the act which is charged as a crime herein. The foregoing facts are an integral part of said act and explain the reason why it should not be punished as a crime.

The place where this crime was committed was within the city limits of Portland, Oregon, along the banks of the Willamette River near the St. John's District. This area is waste land, excepting where there are industrial plants or wharfs. It is situated far below the bluff on which the residential district is located. Except for railroad tracks there are no roadways, and access is had only by a path down the bluff which extends for a distance of approximately one half mile. It is overgrown with brush and small

trees. Unless visited by railroad workers switching trains, there is seldom any occasion for anyone to enter here.

On August 5, 1949, Thelma Taylor, a 15 year old girl, was beaten and stabbed to death at this lonely place along the Willamette River near the St. Johns district of Portland. Five days later Morris Leland was arrested in the possession of a stolen car. The place of his arrest was in the same section of Portland. Morris Leland had a considerable police record and was well known to the officers of that part of town. At the time of his arrest he had been awake from early morning and upon his arrival at the police station, at approximately 2:00 A.M. (Tr. 56) he asked to talk to a homicide officer (Tr. 57).

Thereafter during the course of approximately 20 hours he was questioned by several officers without respite. He was taken twice to the scene of the killing, compelled to make two written statements, one of which was taken by six foot six, 315 pound Detective McKeown (Tr. 166) which was taken after defendant had been kept awake in custody for 20 hours, and according to all the record available had been awake from the preceding morning, and additional 18 or more hours, thus this last "voluntary" statement was taken after 38 hours without sleep and under the most tense conditions.

We will not here rehearse in detail each of the several statements made both orally and in writing. Suffice it to say that there are a few variations in the facts, and in the discussion of the story as hereinafter related these portions will be noted. The only evidence connecting Morris Leland with the crime charged is that provided by his confessions, and these acts are presented here as they are related in those confessions. Unless otherwise stated, the facts herein related are taken from Plaintiff's Exhibit 15.

Early on the morning of August 5, 1949 Morris Leland met Thelma Taylor in St. Johns at a place some fifteen or more blocks from the beginning of the path leading to the

place of the killing, which in turn was from 1,000 feet to one-half mile further on. The meeting took place on the street, and according to the written statements of defendant, Thelma Taylor voluntarily accompanied him to this path and then down the path to an unoccupied spot not far from the river. This was the place where the young woman met her death.

The deceased was going bean picking and had a date to meet a friend at the bus at about 5:00 A.M. that morning. Instead she went with defendant through the whole of the St. Johns district and down to this isolated area along the river. Great effort was made by the able District Attorney to infer that she was forced to go all this distance at the point of a knife. The probability of force being employed over such a distance is remote, and it is only fair to presume, from the absence of any written statement as to force being employed, that none was used. This attempt to insinuate force into this part of the proceeding is an example of over-zealousness by the District Attorney, which we point out as a part of the statement of facts, and which characterizes the whole course of the trial of this case.

The two spent all that day and the next night and until the middle of the next morning together at this place along the Willamette River where Morris Leland had been sleeping for several days prior thereto. This place itself is interesting in that it reflects the fact that Morris Leland lived like an animal in a lair, a fact which is eloquent testimony of his defective reason which we contend legally excused his act.

The confession of defendant states that he started to have sexual intercourse with the deceased, but he did not complete the act as the girl was a virgin (see Plf. Ex. 15, p. 16). (Tr. of Rd., page 366.) That evening she spent with the defendant on blankets which he had at this place. The next morning they awoke about 7:00 o'clock; some time thereafter she asked if she couldn't return to her home, but he

wanted her to wait until evening so that he could leave in the dark and not be arrested.

Within approximately 100 feet from the place where they were there was a railroad switching spur and at this time cars were being switched upon which there were railroad employees visible to the parties, and the girl started to scream. The following is the statement taken from pp. 41-43 (Tr. of Rd., pages 363-364) of Plaintiff's Exhibit 15, which relates defendant's reaction to this screaming:

"CAPTAIN BROWNE:

Q. What was your reason for wanting to kill her?

A. Because I had no reason at first.

Q. *Well, when you killed her, what made you make your decision that you should kill her?*

A. *It just came to me* (snapping fingers), *just the second she started screaming.*

Q. Yes, but you said you previously had picked up this bar in case she started screaming?

A. Just to knock her out.

Q. Just to knock her out?

Q. But you picked up the bar with the intention of using it if she started to scream?

A. If I couldn't quiet her anyway.

Q. Did you make any other attempt?

A. When she started to scream?

Q. Yes.

A. No.

Q. You had the bar for that purpose. When you awakened and she was twenty feet away, was she walking back?

A. No.

Q. Did you call her back?

A. I told her she had better come back.

Q. You told her she had better come back, and then did you pick up that bar of steel then?

A. Not at that time, not till later.

Q. What was the reason why you didn't want her to scream or to leave you?

A. Because I wanted to wait until that night.

Q. Why?

A. I would go with her.

Q. You didn't want to be seen, did you?

A. That is right.

Q. Well, if you had permitted her to go home you wouldn't have had to go with her necessarily, would you?

A. Well, I would have had to leave the vicinity.

Q. Did she say she was going to tell her mother or the police?

A. She was bound to.

Q. Was that the reason you killed her?

A. No; as I stated a little while ago, the reason I killed her was because she started screaming, I had no intention of killing her originally.

Q. What was your intention originally?

A. What I told you at the first of the story.

Q. Did she see the knife when she first met you?

A. I guess not, because I had it inside my coat at that time."

It will be seen that Morris Leland acted under the impulse of the screaming of the deceased and clearly shows his state of mind by describing his idea of killing her as coming to him at the snap of a finger. It is only fair to relate that the testimony of the psychiatrists all state that this was the typical behaviour of the particular type of mental disease from which the defendant was suffering, and that it was probable that his intention to kill the deceased was formed exactly as here described.

After the killing he covered the body in a pyre-like arrangement using driftwood and blankets to partially conceal the deceased. During the following five days he remained in the area of St. Johns and was picked up as above mentioned.

The written statement taken by the court reporter (Plf. Ex. 15) was taken at 7:15 in the morning conveniently be-

fore the opening of court, and while the defendant was exhausted by the long night of inquiry and visits to the scene of his alleged criminal act.

The testimony in the trial relative to defendant's insanity characterized him as a constitutional psychopath, or what is known as a psychopathic personality, a disease which is characterized by a feeblemindedness other than intellectual in which there is commonly defective emotional control and lack of inhibition in the volitional sphere. It is a disease which results in an inability to plan or to make a choice between right and wrong, or to distinguish between right and wrong. This type of mental illness historically was termed moral insanity and did not find favor with the courts or with medical men until its nature and effect became understood during recent years. It can be treated. Persons afflicted with this disease are dangerous because of this disease, and are unable to control themselves because of this lack of inhibition in their volitional sphere.

Its cause can be an injury to the head, can be hereditary, and it can be induced by certain infectious diseases. It is as real as a broken bone. We, in this statement of facts, make a categorical statement that the true psychopath is mentally not responsible for his acts. He cannot plan or premeditate and cannot control himself. The law should recognize the scientific fact and act accordingly in dealing with these people.

Summary of Argument

The argument of this case can be summarized in the three Assignments of Error on file therein. First Assignment of Error relates to the question of the Oregon statutes requiring a defendant to prove his sanity beyond a reasonable doubt when relying on that defense. (Sec. 26-929 OCLA); and the prohibition against relying on the fact that a defendant has a morbid propensity to commit

a crime although it may be a mental disease. (Sec. 23-122 OCLA).

The second Assignment of Error has to do with the refusal of the State to make available to defendant's counsel a confession taken under the pretext that it can be used *for or against the defendant.* Said confession having been taken prior to the defendant having been advised of his right to counsel and prior to his having been granted a preliminary hearing as provided by Oregon law. In the third Assignment of Error the general assignment of a violation of error by the Court below. The substance of all these Assignments of Error is that the defendant has been deprived of due process as required by the Fourteenth Amendment.

The question of insanity is an integral part of criminal procedure. *Oregon is a minority of one in requiring proof of insanity beyond a reasonable doubt.* The rule, stringent as it is, is made worse by barring proof of the type of insanity from which defendant suffers; although this is a medically recognized disease of the mind. To require an impossible burden of proof denies due process; and to refuse to accept scientific reality and medical fact is tantamount to denying all process on this phase of the case.

The questions arising under our Second Assignment of Error are not less vital than those under our first. The confession was taken from the defendant before he was aware of his rights to counsel and before he had been granted a preliminary hearing; but more, it was taken on the pretext that the same could be used for or against him. Due process of the law requires the defendant to be represented by counsel and that representation be made effective. It is our contention that the refusal to permit counsel to see the confession and to use the same for defendant as was promised to defendant, effectively denied due process. Counsel was unable to prepare his case, to argue his case or to

consult with psychiatric experts before the trial as this confession was in effect the whole case. Further, the second confession was taken after defendant had been in custody 20 hours and kept awake all that time. Our court ignored the requirement defendant be taken before a magistrate, granted counsel, and advised of his right against self-incrimination.

ARGUMENT

Assignment of Error No. One

The Courts below erred in upholding the validity of Oregon's statutes regarding the proof of insanity despite defendant's contention that said statutes, 26-929 and 23-122, OCLA, deprived defendant of his life and liberty without due process of law as guaranteed under the 14th Amendment to the United States Constitution; in that defendant was required to prove he was insane beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as a defense to a crime.

> Section 23-122. *Morbid propensity as defense.* A morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.
>
> Section 26-929. *Insanity must be proved: Effect of intoxication.* When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt; and no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

ARGUMENT

Oregon a Minority of One:

In our first Assignment of Error we question the constitutionality of the Oregon law regarding the proof of insanity. We have complained that Section 23-122 OCLA deprives the defendant of his right to prove as a defense to the crime charged a scientifically accepted and medically recognized mental disease. Section 26-929 makes Oregon *a minority of one* in that it requires a person asserting the defense of insanity to a crime to prove his insanity beyond a reasonable doubt. *State* v. *Wallace*, 170 Ore. 60, 131 P. 2d 222; *State* v. *Grieco*, 184 Ore. 253, 195 P. 2d 183. Thus the State of Oregon accomplishes the evil that Black in his text on Constitutional Law warned against. See Black's Constitutional Law, 2d Edition, page 519.

> "The constitutions were not intended merely to secure the right of trial by jury, but also insure that it should be continued in existence as a substantial and valuable protective right to private suitors. Now it is evident that it would be entirely feasible for a state legislature, if so minded, to impose conditions upon this right as to make practically unavailing to a party for his protection, yet without denying it in express terms. But this would be a palpable violation of the spirit and intent of the constitutional provision, and the Courts would hold any such restrictions upon the right as not only unconstitutional but a total denial of it."

In treating this assignment of error, it would be interesting to historically review the origin of Section 26-929 OCLA. It is particularly interesting and important to determine how a single jurisdiction came to have a rule of such severity. When you couple this rule with the effect of 23-122 OCLA which denies the defendant the right to prove a recognized mental disease, which is the particular mental

disease from which the defendant is suffering in this case, you have a two-fold deprivation of due process of law. Either of these rules, standing alone, would deprive the defendant of this right guaranteed under the 14th Amendment of the Constitution of the United States.

History of Legislation:

We will treat these two sections together, discussing the practical application of these two rules and showing how both of them are contrary to the accepted principles of justice. We will also show how one of these sections came into Oregon Law through a mistake made by the original draftsmen of the Oregon Criminal Code. This in itself, of course, would not render the law unconstitutional; but when a mistake creates a law which in itself denies due process, it can be well considered by this Court in determining whether or not the law should be declared unconstitutional.

The task of preparing the Oregon Criminal Code was assigned to a Committee headed by Judge Matthew Deady. Nominally he had assistance. In effect, the work largely fell on him (See Pacific Northwest Quarterly, Volume 27, No. 1, Article by Arthur S. Beardsley). The legislature, desiring to enact a complete criminal code and being encouraged to act immediately by the then governor, adopted Judge Deady's code in its entirety, including therein that Section which is now 26-929, OCLA. This was entitled in the original code Section 204. Apparently the basis of this criminal code was laws of the State of New York; and, for the support of the rule that the defendant should prove insanity beyond a reasonable doubt when asserted as a defense for a crime the codifier cited three New York cases, *People* v. *Lake*, 2 Park Cr. Rep. 215; *People* v. *Kirby*, 2 Park Cr. Rep. 28, and *People* v. *Sprague*, 2 Park Cr. Rep. 43. However, in a later New York case, *People* v. *McCann*, 16 NY 58 (2 Smith), the New York court rejected the rule that

the defendant should be required to prove his insanity beyond a reasonable doubt and apparently adopted a rule that the State should prove sanity beyond a reasonable doubt.

A reading of the New York cases cited might well indicate that there was some question whether or not New York ever did actually have a rule such as was codified by Judge Deady, the now Section 26-929. Regardless, New York shortly after the enactment of the Deady Code unequivocally abandoned the stringent rule of proof of insanity which has since that time been the codified law of Oregon.

Thus, by error, or at least without much consideration and no debate, the present rule became law. Oregon became the only state in the Union which definitely adopted this oppressive rule. We will now briefly discuss other instances where the right to prove insanity has suffered by legislative action and the action by the courts in declaring said laws unconstitutional.

There have been attempts in two states to completely abolish the defense of insanity. Both the State of Mississippi and the State of Washington attempted to do so. In both of these states their Supreme Courts held that the abolition of this defense violated due process of law. See *Sinclair* v. *State*, 161 Miss. 142, and *State* v. *Strasburg*, 60 Wash. 106. These two cases so far as counsel has been able to determine are the only two instances in which the appellate court has passed on this precise question in this matter. See also *Phyle* v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131 (See Note 1), also *Solesbee* v. *Balkcom*, 339 U. S. 9, 70 S. Ct. 457.

Note 1. While in the last two above cited cases, Phyle v. Duffy, and Solesbee v. Balkcom, the right to trial by jury before conviction was conceded by implication, there is no U. S. Supreme Court decision directly on this particular question. The answer is seemingly so obvious that it has never arisen. The two decisions in the State Courts where the question has been passed on indicate a surprise on the part of those courts that a legislature should have the temerity to abolish this long existing defense to a crime. The basic nature of the right is sufficient explanation for

Judicial History and Criticism:

The rules established by Section 26-929 and Section 23-122 OCLA have been passed on by the Supreme Court of the State of Oregon in several decisions. The earlier decisions, such as *State* v. *Hanson*, 25 Ore. 391, 35 Pac. 976, were not too critical of the rule, but commencing with the case of *State* v. *Riley*, 147 Ore. 89, 30 Pac. (2d) 1041, the Court begins to re-examine the rationale of both rules. In the case of *State* v. *Wallace*, 170 Ore. 60, 131 Pac. (2d) 222, a full review of the rule is made. The Court comments that Oregon is the only State in the Union requiring such a strict burden of proof of insanity. In the Wallace case the rule is upheld but only after extended rationalizing by the Court.

In the case of *State* v. *Grieco*, 184 Ore. 253, 195 Pac. (2d) 183, the matter is questioned on constitutional grounds and the question is thoroughly and well presented to the Court in the brief of appellate counsel in that case. The Supreme Court of the State of Oregon said, quoting from page 262,

> "That the strong argument of counsel for defendant on this phase of the case would be more appropriately addressed to the legislature. As stated in State v. Hanson, 25 Ore. 391, 35 Pac. 972, referring to the statutory rule in this state relative to the burden of proof 'It is not in the province of the Court to question the policy of a law or to say that the rule established in such cases is inhuman, or that the state should in any contingency, be required to establish the fact of sanity like any other fact beyond a reasonable doubt.'"

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the absence of a direct decision by this Court on the subject. The State Courts have been too well schooled in the traditions of our Common Law and Constitutional Rights not to decide the question before appeal to this Court has been necessary.

The Court goes on to base their ruling not on any rational principle nor on an unbiased consideration of the authorities and reasoning of appellate but states

> "That the constitutionality of the act has never, until now, been challenged. We agree that counsel are not, by reason thereof, precluded from questioning the validity of the statute, but it is submitted that after a rule has been so well settled, a Court should, indeed, be reluctant to disturb it."

This case of *State* v. *Grieco* is comparatively recent Oregon law and, appellant and counsel for appellant therein were met in the court below with a considered and apparently final decision of the Supreme Court of the State of Oregon.

The case of *State* v. *Garver,* 190 Ore. 291, 225 Pac. (2d) 771, was not decided at the time of the hearing of our case before the Supreme Court of the State of Oregon. However, in commenting on questions raised in the Grieco case and the other precedents and in particular on the question of the morbid propensity statute, the Court on page 298 says as follows:

> "As indicated in State v. Wallace, supra, and State v. Hassing, supra, this statute ties the hands of the Court and prevents it from liberalizing the rules governing the insanity defense, *even though the Court should be of the opinion that these rules do not take sufficient account of discoveries of modern medical science.* We are unable, therefore, to sustain this assignment of error." (Italics added.)

In the decision of the Supreme Court in the case of *State* v. *Leland,* the case presented herein, we quote on page 638, (190 Ore. 598, 227 Pac. (2d) 785,

> "We are once again asked to hold unconstitutional the Oregon Statute 26-929 OCLA which casts upon

the defendant the burden of proving defence of insanity beyond a reasonable doubt and overrule the recent decision. In State v. Grieco, supra, we rejected that contention. We are also again asked to abandon the so called 'right and wrong test' of insanity and adopt the rule of 'irresistible impulse.' In State v. Garver we re-examined the question and reached the conclusion that, *even though we thought it desirable,* we could not, in the face of 23-122 OCLA abandon the rule of our decisions, that insanity as a defence to a crime is a disease of the mind which tenders a person in capable of understanding the nature, quality and consequences of act, or distinguishing between right and wrong in relation to such act. Nothing has been presented in this case upon this question not heretofore considered by us in the Garver case. We adhere to that decision. *We have heretofore recognized the harshness of the legislation with regard to the burden of proof of insanity."* (Italics added.)

Thus we have an often repeated recognition by the Supreme Court of the State of Oregon of the harshness and unfairness of these rules, yet a reluctance to change the same for fear of trespassing upon the rights of the legislative branch of the government of this State. We have a refusal, particularly in the Grieco case, to analyze whether or not this in effect does deprive the defendant of due process; and an attempt to excuse this refusal, not by any logic, by rather a weak and unlegal statement, that since the law has long been on the statute books of the State of Oregon that the same should not now be changed without the legislature taking action. This, of course, is an expression of the obvious uncertainty of the Court in face of the strong argument of the appellant therein. Had the Court been convinced of the constitutionality of the statute they would have rather buttressed their argument with something more appealing to logic than lame and half-assured reliance on negative precedent presented by the

former cases in which the constitutionality of this question had not even been raised.

That the law is harsh and unfair has been further recognized by the committee reports on criminal law and procedure of the Oregon State Bar Association. (See note 2.)

We have thus briefly outlined the history of the defense of insanity in the State of Oregon and brought the Court up to date on the attitude of the Supreme Court of the State and on this question. To sum up, it is recognized that Oregon has a harsh rule on insanity. We are the only state in the union that maintains this harsh rule, that the rule does not accord with medical progress and scientific fact but as stated in the quotation from *State* v. *Hassing,* 60 Ore. 81, 118 Pac. 195:

> "Although not a test of insanity, the knowledge of right and wrong is a test of responsibility."

The direct question of the constitutionality of this statute has not been raised until the case of *State* v. *Grieco,* supra, and the Court refused to meet the question squarely, using the long existence of the rule as the primary reason why the law should not be declared unconstitutional. It now devolves upon appellant to show this Court why the law should be declared unconstitutional and why the same deprives the defendant of due process of law as guaranteed by the 14th Amendment of the Constitution of the United States. (See Note 3.)

Note 2. The Oregon State Bar Associations' Committee on Criminal Law and Procedure recommended a reform of the Oregon Laws here put in issue. This recommendation was made both in 1950 and 1951. The legislature failed to act on the suggestion.

Note 3. We have reviewed the history of these rules in Oregon. In considering the refusal of the legislatures to correct the mistake of the original codifier of the Oregon Criminal Code, despite the repeated criticism of the State Supreme Court, it must be borne in mind that the State Legislature meets only once every two years, and then in a strictly

Basic and Substantial Rights Violated:

It cannot be seriously argued that the rules established by these statutes are merely procedural and not of a substantial nature. Rightly, the Supreme Court of the United States does not concern itself with the mere technique of justice, if the States afford substantial justice in their procedures. The question then is, is substantial justice afforded under the rules of these statutes. Certainly, a rule of evidence governing the burden of proof and what can be proven is substantial matter in affording or denying justice. See *Tot* v. *U. S.*, 319 U. S. 463, 63 S. Ct. 1241. Under the Oregon law a party is in effect barred from asserting a particular type of insanity and required if he pleads insanity to prove it beyond a reasonable doubt which in the chaotic state of this aspect of medical science becomes an impossible standard of proof.

We cannot conceive of it being seriously contended that the question of a man's sanity would not be an integral part of due process of law. To accuse an insane man of a crime and to punish him for the same would certainly not accord with due process of law but would rather be a capricious, arbitrary act by a sovereign. It would not be any less reprehensible and unjustified than the executions of so-called inferior persons of the German Third

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limited session. Until 1951 the legislators received pay for only forty days, and sessions seldom lasted longer than ninety days. The press of business is always so great that matters such as this are seldom considered and then lost in the midst of other and more imperative problems. There is no interested lobby or group pushing this not too popular change.

The failure of the State Supreme Court to correct this particular mistake stems perhaps from reluctance by a lower court to take a stand on an unpopular problem when the onus of the wrong done can be placed on the legislative branch. It was no doubt felt by the Oregon Court that in the proper case this matter would be decided by appeal to the U. S. Supreme Court. This no doubt would have done in the Grieco Case had the sentence been death, but since the penalty there imposed was imprisonment, the case was not appealed further. See State vs. Grieco, Supra.

Reich. A state cannot justly, by legislative fiat, deprive a person of his life or liberty. The commission of a crime implies a conscious wrongdoing. We cannot within the limits of due process punish a man for something beyond his moral control. See *Sinclair* v. *State*, 161 Miss. 142; *State* v. *Strasburg*, 60 Wash. 106. The question has, as above stated, never come before this Court. In the case of *Phyle* v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131, and *Solesbee* v. *Balkcom*, 339 U. S. 9, 70 S. Ct. 457, it was assumed that the assertion of a defense of insanity was a guaranteed right. The question involved in these latter cases was whether or not a judicial determination of insanity intervening after a trial was a right guaranteed by due process of law. Mr. Justice Frankfurter in his dissenting opinion in the case of *Solesbee* v. *Balkcom*, supra, discusses at great length the history of insanity of a defense to a crime, from which the following quotation is taken:

> "It is now settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles as deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and just."

The writer goes on to review the history of the origin of the limitation of the sovereign's right to punish the insane and their right to a trial by jury. He demonstrates that this right is so basic and native to our legal and cultural tradition as to be assumed when the question is raised before trial and conviction.

State Relieved of Burden of Proving Elements of Crime:

Further, Section 26-929 OCLA shifts to the defendant the proof of one of the essential elements of the crime charged. Blackstone has stated:

"To make a complete crime recognizable by human laws there must be both a will and an act." (Blackstone's Commentaries quoted in State vs. Strasburg, 60 Wash., 106, regarding insanity as a defense to a crime.)

To require defendant to prove insanity beyond a reasonable doubt shifts to him the burden of proof of one-half of the element of the crime charged, the willfulness. (See *Tot* v. *U. S.*, supra.) It goes without saying that the presumption of innocence is an integral part of our law and constitutional system, indeed, a part of the law of all civilized free men. The unique rule of the State of Oregon vitiates the whole idea of these basic principles. It in effect abolishes the defense of insanity.

Insanity is seldom an ever-present condition. It is, rather, a transitory condition between periods of lucidity. It is inconceivable how insanity at any particular moment could be proven beyond the reasonable doubt required by the unique Oregon Law. Barring the impossible situation of having medical witnesses to the crime, whether or not a person is insane or not at any chosen time would always be subject to some, not unreasonable, doubt. It would always remain more or less a matter of conjecture and probability rather than of moral certainty required by Oregon law.

Burden Shifted in Proof of First Degree Murder:

We have not here touched on the question of whether or not the Oregon statute deprives the defendant of his presumption of innocence. It suffices to say that this contention is implicit in the arguments above set forth. The shifting of the burden of proof to the defendant of such an important element of the crime as willfulness, premeditation and specific intent has the practical effect of shifting the burden of proof of the whole crime to the defendant. The

state, of course, will contend that this burden remained with the state, but how is a jury to determine the fine distinctions and intelligently find that burden which lies with the State of Oregon and that onerus burden which lies with the defendant. In this case, as a matter of fact, the only issue was that of sanity. Was not the real burden of proof on the defendant and that burden the almost impossible one of proof beyond a reasonable doubt? If a defendant cannot legally be excused from his act because he has a morbid propensity for such an act; and, yet, at the same time the State must prove a willfulness, premeditation and specific intent, do we have a further practical deprivation of due process of law by the resultant confusion?

Murder in the first degree requires malice, willfulness, premeditation and deliberation. These are all part of the State's case and must be proven beyond a reasonable doubt. When the Oregon law requires the defendant to prove his insanity beyond a reasonable doubt and denies him a right to prove at all as a defense to a crime, the "morbid propensity" that has destroyed his will power, we have a real shifting of the burden. It creates a presumption of guilt as surely as the offending statute in *Tot* v. *U. S.*, *supra*.

Due Process Requires Recognition of Scientific Reality:

The requirement that a person be afforded substantial justice and due process of the law is not frozen as of the date of the enactment of the constitution. It was rather an admonition and requirement that the reality of due process of law be accorded to citizens from that time forward by the states. Due process of law requires the states to accord to their citizens an opportunity to prove accepted scientific facts. Let us suppose that this Court were required to pass on the validity of a statute outlawing witchcraft and punishing the witch by execution in a lethal chamber, such as the defendant herein will be punished. Could this Court

ignore the fact that in the last part of the 18th century in the most civilized countries of Europe they were still punishing witchcraft by death? In this, middle of the 20th Century, such trials would be regarded as traversities on justice and monuments to superstition. Would not this Court require that state to take cognizance of recognized scientific progress, and would not this Court conclude that such a statute deprived a person of his liberty and life without due process of law? Is the analogy between that sort of a crime and punishment and the Oregon insanity rule far fetched? The whole science of psychiatry, the enormous expansion of the understanding of mental disease, the intelligent abandonment of a supersituous approach to moral aberration is a product of the past century certainly since *McNaughton's* case. Are we justified in permitting a statute which abolishes a defense to crime based on a recognized mental disease? Can this Court say that statute does not deprive a person of the right to prove his insanity and to excuse his responsibility under the law? In essence, ignoring medical progress and scientific reality does deny due process.

Prejudice Prevents Due Process:

In approaching this problem it is incumbent upon the Court to understand that persons charged with terrible crimes are usually friendless. In this case counsel accepted the task of defending the appellant with little or no enthusiasm but approached the problem as a duty both as citizens and as lawyers. The natural repugnance of orderly persons to unfortunates who suffer from the affliction that defendant suffers from tends to affect everyone connected with the decision of the case: the prosecutors, the defendant's attorneys, and the jury, and Court. They tend to become blind to the basic principle that we are punishing a wrong doing rather than eradicating a social problem. If

we assume that we may erradicate a social problem regardless of fault, then perhaps we should extend the rationale of the morbid propensity statute to do away with the poor unfortunates in our feeble minded homes or even to go to the logical conclusion of the materialistic philosophers of our century's extremes of statism.

Do not be deceived—these arguments are not far fetched. A reference to the press and editorials of this case will convince the Court that the spirit that moves the prosecution of crimes is not based on principles of orderly justice but is rather a mixture of vengeance, hatred, superstition, prejudice and expediency.

No one will seriously argue that the State of Oregon will be better off for preservation of the life of the defendant, but the persons who with honest certainty accept the premise that he can be done away with must blush to accept the equally logical premise that we could punish or do away with the chronic alcoholic who is a public charge or the mongoloid baby. It is of utmost importance that as a legal principle the premise that *there can be no guilt without fault* be protected by the 14th Amendment of the Constitution of the United States. This transcends any argument of whether a certain type of trial is guaranteed by the 14th Amendment or whether a person should have the right to a formal indictment or protection against self-incrimination. This goes to the very core, the essence, the heart of the democratic constitutional government.

It will be seen from the foregoing that our approach to the problem raised in our first assignment of error is not greatly affected by various contending theories of whether or not the 14th Amendment applies to all the first ten amendments to the Constitution of the United States, nor do we base our theory of the case on whether "natural justice" would require the State of Oregon to give us a more substantial process. We say that we have been denied due

process by the onerous burden of proof placed upon us, and denied any process with regard to the particular type of insanity from which our defendant is suffering by the morbid propensity statute of the State of Oregon. The abolition of due process of law even in the most open tyranny will seldom, if ever, take the form of denying a person some semblence of trial. Oppression always seeks to justify itself with form. The form of process exists in Oregon. The substance does not. The force of oppression here is not obvious but it is real. It is the oppression of expediency, superstition, prejudice and formalism, the oppression that we refuse to change a law not because it was a proper and constitutional one, but because it had been on the statutes for many years. It reflects a collective, constitutional psychopathy. It is lack of conscience just as the appellant herein lacked conscience; but it is lack of conscience not without fault, but a deliberate act of the sovereign in ignoring moral responsibility.

The constittuion of the United States is not a wooer of popular opinion. It is a standard by which popular opinion is kept within bounds. The natural reluctance of a court to infringe upon the legislative power of the several states is sensible. But the power to do so is essential to free government; and, when needed, it should not be exercised timidly or even reluctantly but should be exercised forcefully and effectually. It should be exercised here to correct manifest injustice.

Psychiatric and Medical Background:

The comments by Mr. Justice Frankfurter in *Solesbee* v. *Balkcom, supra,* and the comments and statements in other cases show that this Court is fully cognizant of the facts of psychiatric science. Counsel for appellant herein lacks the technical training, background and facilities to fully exhaust this interesting and important problem. It suffices to

say that most, if not all, of the authorities, in discussing the question of whether or not a constitutional psychopath is mentally ill, recognize the fact that this is indeed a disease, discuss its origins, prevention and possibility of cure. None of the modern authorities adhere to the original conception of what a constitutional psychopath is. They unanimously say that the causes of this condition can be several, namely, heredity, congenital disease, malformations causing a lack of blood circulation in the brain, improper diet, trauma, and a combination of the above enumerated causes. It is in the record of this case, see testimony of Dr. Evans, the State psychiatrist, by Dr. Williams, a state psychiatrist, by Dr. Haskins, psychiatrist called by the defendant but a recognized psychiatric authority in this state, and now two psychiatrists of the Roseburg United States Veterans' Hospital and by Dr. Dixon, defendant's psychatrist and also a recognized authority in this state, that this condition is a disease. It is also in the evidence of this case that it is a disease affecting the volitional powers of the sufferer and a disease inhibiting the exercise of will power.

All of the experts agree that the above listed causes can singly or in combination cause the condition. The probabilities of this having been caused by the accident are sustained by the testimony of the experts. Naturally, whether or not this was a single and lone cause cannot, at this late date, be determined absolutely; but, regardless, any of the causes were beyond the control of the defendant and certainly should not be chargeable to him. The import of the evidence of his personality change two weeks after the accident, of course, cannot be overemphasized and must be in lieu of other evidence taken to have been the main eitological factor. (See def. Exhibit 20.)

The State of Oregon has not seriously contended that the defendant's condition is other than a diseased condition. They have given no evidence to indicate that it was caused

by the defendant's own fault. Primarily, we believe, because none can be found but, secondarily, because of the antique condition of the Oregon law they felt that they were protected and that the realities of the condition would not become an important consideration in this case. Regardless, we must assume from the testimonies of their own experts and from all the medical texts which we have been able to examine that this is a disease caused by conditions beyond the control of the sufferer which cannot be successfully cured after adolesence; and, further, this is a disease that inhibits, and in effect, destroys the volitional power of the afflicted person. It is further to be assumed that when this inhibition of the volitional power is coupled with substandard mentality, as is here the case, that the sufferer is completely helpless. (See Exhibit 23.)

History of So-Called "Moral Insanity"

A brief review, by no means claimed complete, of the historical development of the treatment of constitutional psychopaths should be made at this time.

Our "morbid propensity" statute is an outgrowth of the history of this particular disease. Our attitude toward the burden of proof perhaps and probably is a result of the codifier's error, but it, too, reflects the then existing prejudice against the defense of insanity and the attempt by the legislature to, in effect, deprive persons suffering from this disease of the right to assert that defense.

A constitutional psychopath is a person who suffers from an inhibition of his volitional powers which renders him unable to control his actions with regard to right or wrong; although he may in effect recognize the existence of a difference. He is such a person who, when asked whether or not it would be wrong to kill someone, might answer it would be wrong; but, if the proper stimuli were applied, would kill the person without regard to the rectitude of the act and

without regard to the probability of punishment. He is exactly the person with whom we are dealing here. There are degrees of this condition. There are persons so afflicted who live in society without being recognized for what they are, and who adjust themselves to society insofar as they avoid the affliction of punishment; but they are never truly useful members of society nor are they able to place themselves with respect to obligations and future planning so that they completely free themselves from their constitutional affliction.

It is, however, not of too much import, to consider the constitutional psychopath who has adjusted himself to society. These persons are not completely afflicted with the disease and generally are of superior intellectual attainment and high intellectual quotient. Some are even important in their selected field. Their adjustment may be a result of their ability in overcoming their infirmity; and, when combined with a less severe condition, this may permit them to appear to the world as normal persons.

This condition was recognized since the 17th or 18th Century as "moral" insanity. There are cases recorded in the French and English criminal annals which are similar to the case at bar. These unfortunates recognized the fact of right or wrong but could not explain why they did wrong. To understand the development of the right and wrong test properly and to understand the approach of society to this type of crime we must place ourselves in the atmosphere existing at the time of the development of what came to be the Oregon rule. *McNaughton's* case, 10 Clark N. F. 200, 8 Eng. Reprint, 718, (*McNaughton's* Case, 1843, 10 Clark, N. F. 200) was decided before the development of the science of psychiatry existed and within 50 years of the time when the most advanced countries of Western Europe were still considering the propriety of trials for witchcraft. This case created a rule and test which had only one merit, that

of simplicity. Of course, its viciousness was not apparent; because of the ignorance of the times veiled the realities of the human mind and forbade the appreciation of the possibility of the progress which ensued in the next century. Most authorities of this period, the late 18th and early 19th century, regarded persons suffering from the affliction from which the defendant suffered as moral pariah. There was something lacking in their moral makeup, their spiritual nature; and thus, when this condition was first isolated and recognized, the sufferers were called "morally" insane.

Our criticism of the "right and wrong" test does not imply our client is able to differentiate or understands the nature of his acts. Rather, as Dr. Haskins testified, we claim he is not capable of distinguishing right from wrong. (Tr. 270.)

That the assumption that a person who is suffering from constitutionally psychopathic state is morally degraded and condemned should persist into the middle of the 20th Century offends the logic of all the writers who have commented on the subject. We are not ignorant of the condition. The etiology, the onset, the cure, and the duration of the disease are all known. It is also known that, as far as medical science has now progressed, a cure cannot be effected after a certain age. The effects of the disease are certainly known now as they have been for a long time, but a recognition of it as a disease is resultant from a full appreciation of the foregoing. Consequently, modern medical science recognizes that this is as much a question of mental disease as any other phase of mental aberration; and it is only because of the stupid adherence to non-fact justified by precedents by our Courts and legal profession that the constitutional psychopath is treated other than any other raving maniac. It is just this gross and unjustified stupidity, encouraged by superstitious prejudice, that has forestalled a proper attitude and treatment of this large bulk of unfortunates.

The classic expression of this illogic finds itself in the above quoted portion of the case of *State* v. *Greico, supra:*

> "But it is admitted that after a rule has been well settled, a Court should, indeed, be reluctant to disturb it."

This Court in the dissenting opinion of Mr. Justice Frankfurter in *Solesbee* v. *Balkcom* has commented on the necessity of a hearing on the question of insanity because of the confused state of psychiatric science. How much more does this apply to the requirement of the burden of proof. If the experts are confused how could we ever sustain the burden placed upon us?

Psychiatric and Medical Authorities:

Appellant's counsel have read a great mass of medical authority discussing the exact condition of the defendant in this case, and the unpardonable lag between medical science and legal precedent. We do not desire to encumber the record of this case with lengthy quotations from the innumerable medical authorities. We will instead recite a representative group of them and will rely upon the unquestioned testimony of Dr. Evans, the State psychiatrist, that this particular infirmity from which the defendant suffers is a disease of the mind which could have been and probably was caused by trauma, plus a combination of other causes, such as heredity, malnutrition, or infectious disease, all of which were beyond the control of the defendant. See pages 291 to 298, inclusive, Transcript of Testimony, for a review of texts used in trial and testimony establishing this as a mental disease.

One of the texts approved by the experts on cross-examination as an authoritative one is entitled "*A Textbook of Psychiatry for Students and Practitioners*" by D. K. Henderson and R. D. Gillespie: Dr. Henderson, Superintendent of the Royal Edinburgh Hospital for Mental Disorders, and

Professor of Psychiatry at the University of Edinburgh; Dr. Gillespie, prominent British medical psychiatric authority, Lecturer on Diseases of the Mind at the University of London and the University of Aberdeen. The book is published by the Oxford University Press and is the fourth edition, published in 1937.

> "Trauma may produce mental symptoms in one of two ways. Either it causes structural injury to the brain, or it causes emotional disturbances which in one form or another are prolonged for some time. In the first case the mental reaction is of the organic type, often with more subtle changes of 'constitution' or personality; in the second the result is usually a psychoneurosis. In the first group the injury is directly, or indirectly, to the head; in the second, the seat of injury may be anywhere—or nowhere." Page 62.

In *"Practical Clinical Psychiatry for Students and Practitioners"* by Edward A. Strecker and Franklin G. Ebaugh, Dr. Strecker is associated with Yale University and the University of Pennsylvania in the Department of Psychiatry, and Dr. Ebaugh is Professor of Psychiatry at the University of Colorado Medical School and director of the Colorado Psychopathic Hospital, and also National Chairman for the Committee of Mental Hygiene. This book was published in 1935. Quoting from page 68 of this book the psychopathic personality is described as follows:

> "In a strict sense psychopathic personality is a constitutional reaction, the kind of feeblemindedness other than intellectual in which there is commonly defective emotional control and lack of inhibition in the volitional sphere."

This definition was approved by all the doctors who testified in the case as being a correct one. See also *"Outlies of General Psychopathology"* by William Malamud, M.D., Professor of Psychiatry, State University of Iowa, and assistant director of the Iowa State Psychopathic Hospital.

A very clear discussion of a constitutional psychopath is given on page 370 of said text. This text was published in 1935 by W. W. Norton & Company. This book is an analysis of the constitutional psychopath and sets forth the fact that it is a condition which is both congenital and acquired and discusses the same in quite some detail.

In *"Textboof of Psychiatry"* by Prof. Dr. Eugen Bleuler, Director of the Psychiatric Clinic, in Zurich, Switzerland, the English version of this book was printed by The MacMillan Company, and the edition used is that of 1924. On page 569 of the text, under the heading of "The Psychopathies" we find the following language:

> "From what degree of the intensity and the grouping of the symptoms one wishes to designate the psychopath as sick is arbitrary, and from what degree one no longer wishes to consider him as a psychopath, but as insane, is not seldom the same. *Many psychopaths are really only in the social sense 'not insane'; before the forum of natural science they suffer from the same anomalies as many insane, only in a slighter degree; they are paranoid, schizoid, latent epileptics, cyclothymic, etc.*" (Emphasis in original text.)

There are other texts which we may cite, all showing that the general regard of medical authorities for this particular classification must be borne in mind and that the evidence in this case, particularly by Dr. Dixon, is that this was a most typical case of a seriously afflicted constitutional psychopath.

Medical Criticism of Legal Conception of Insanity:

We also refer to just a small part of the criticism directed at the legal approach to insanity as a defense to a crime. On page 580 et seq. of the *"Text Book of Psychiatry"* by Henderson and Gillespie supra, there is a discussion of the relations of psychiatry and law particularly directed at criminal responsibility. They discuss the unsatisfactory

situation as it exists in both England and United States in the legal profession's and court's antiquated adherence to the concepts of insanity and in particular to the so-called "right and wrong" rule. The criticism by the medical profession of the legal attitude toward insanity is not new. As early as 1838 Issac Ray in a treatise on *"The Medical Jurisprudence of Insanity"* published in Boston by Charles C. Little and James Brown stated as follows:

> "Much of the jurisprudence of insanity, in times past, bear the marks of crude and imperfect notions, that have been entertained by its pathological character, is not to be wondered at; but, it is a matter of surprise, that it should be adhered to, as if consecrated by age, long after it has ceased to be supported by the results of more extensive and better conducted inquiries."

In discussing Ray's work and other volumes, Gregory Zilboorg, chairman of the Committee on the History of Psychiatry, American Psychiatric Association, and instructor of the New York Psychoanalytic Institute, contributed in the American Psychiatry Centennial Edition 1844-1944 an essay on the *"Legal Aspects of Psychiatry"*, the same being published by the Columbia University Press in 1944. He castigates the attitude of the legal profession and the courts, both as to the right and wrong rule, the adherence to the idea of "moral insanity" which was the early definition of a constitutional psychopath, and generally reviews the various suggestions made, among them a strict regard of what medical science regards as mental disease as a test to guilt. Discussing the right and wrong test he shows where it has always been criticized and shows how the irresistable impulse test came into being as early as 1863. This in particular is critical of the McNaughton rule. The following language is used on page 565:

> "Yet only seventeen states of the Union recognize the irrestible impulse as a legitimate plea today. Moral

rather than scientific sensibilities are responsible for the prevalence of the right and wrong test—the test to which Ray objected in 1838, and which Sir James Stephen forty-five years later considered among the 'antiquarian curiosities' of the law."

He goes on to state that in 1847 Dr. Gould made the following finding in a report to the Legislature of the State of New York on the conditions in the State Hospital:

"That with scarcely an expection, its inmates had clear ideas of right and wrong and of the distinction between them; the same test has been applied in many of the asylums of our country, and the result has been, that not more than ten percent of the whole number would be exempt from legal responsibility under its operation, and these were so furiously mad as to be manifestly dangerous to be at large."

It is not feasible here to quote the numerous like statements in this excellent essay by Dr. Zilboorg, but we suggest that it completely supports our thesis on this assignment of error.

In the text above cited by Dr. Strecker and Dr. Ebaugh we have a typical case of the said discrepancy between scientific fact and legal attitude given on page 474 of that text and the authors comment on the case as follows:

"It is a typical constitutional psychopathic defect phenomena. The intellect is capable of appreciating that the conduct is considered wrong. The emotional-ethical sphere is so circumscribed that there is an absence of feeling about it.

"The situation, too, illustrates nicely, the inadequacy of our present medical-legal possibilities. In the instance of a man, a conscientious, very intelligent and sociologically minded judge could do nothing but sentence the man to a term of several years imprisonment. There was, of course, no charge against the woman."

We might add here that in a later edition of a text by the same authorities, a copy of which we were unable to obtain

at the time of the preparation of this brief so we are unable to cite the page here, the following language was used in reference to a psychopathic inferior or constitutional psychopath.

> "There is considerable dispute as to the etiological importance of injuries, but obviously it is significant enough. Other causative factors are congenital syphilis, birth injury, such inflammatory infections as meningitis and certain neurological diseases, *head trauma, endocrine disturbance and inbalance.*" (Italics added.)

It might be well to point out that Dr. Evans, the State psychiatrist, agreed that this was an accurate statement of the etiological factors to be considered in Morris Leland's case and it certainly is significant in the light of the personality change noted shortly after head injury when he was six years old.

Later on, on page 293 of the transcript, Dr. Evan agrees with the statement from a text by Dr. Harry C. Solomon of the Harvard Medical School and Dr. Paul I. Yakovlev, who is also an instructor in neurology at the Harvard Medical School, quoting therefrom:

> "Personality Disorders. Disorder of personality is common in minor degrees after severe head injury. The less severe the head injury and the more prominent the change, the more some predisposition to periodic mood disorder should be sought. The psychopath tolerates head injury badly, and here the emotional disturbance is more important than organic damage sustained. A severe disorder in personality following a brief amnesia (e. g. less than six hours) is to be attributed to emotional factors and predisposition."

The medical texts on both points are numerous and the facts claimed by appellant are nearly unanimously approved by medical thinkers. We have confidence that as

indicated by Mr. Justice Frankfurter in *Solesbee* v. *Balkcom, supra,* that the Court is aware of this situation and able to supplement our, by no means complete, citation of medical authority.

Due Process Requires Law to Keep Abreast of Scientific Progress:

Let us say this in closing on this particular phase of our argument, if the Courts refuse to look at all phases of reality as they are accepted by the experts in the fields involved; but, because of external pressure, they adhere to abandoned and the discredited ideas which represent the thinking of past years, which at that time could be accepted because of the poor development of the science involved, you will have a deprivation of due process of law. We cannot stress too strongly that the vitality of constitutional government and government by laws requires judicial courage to keep abreast with reality—even in unpopular decisions. Ten thousand legal precedents will not make Copernicus wrong. We know the earth is not the center of the universe. We know fully as well that the appellant herein is suffering from a disease as real as a broken bone. The State of Oregon cannot justly punish a person because he is sick. The people in the State of Oregon are prohibited by the 14th Amendment to the Constitution from doing so. The Supreme Court of the State of Oregon did not protect the people of our State from this injustice. They acknowledged an obligation of the state by blaming the legislature for not having corrected the condition. There is no higher Court than the United States Supreme Court for the appellant to appeal to. This decision squarely decides whether or not the sovereign, in this case the State of Oregon, is bound by the principles of moral justice, by the realities of scientific progress, and by just good common sense. This decision will decide whether the 14th Amendment of the

Constitution acknowledges the foregoing as a basis of our constitutional government and due proces of law. If there can be guilt without fault despite the 14th Amendment of the Constitution then our vaunted democracy is an idle boast and the state can and will engulf us all. Unless there is a restraint on what the State can do, and that basically is a question of punishing only where there is a conscious wrongdoing, we, by implication, validate the tyrannies of both the right and left that have so punished our generation.

Question Involves Due Process and Is Not Dependent on Bill of Rights:

The logic of our stand, we feel, is unassailable but to rely solely on logic and principle in argument might imply a weakness. If we search for precedent we could not possibly find a more unambiguous statement of our case than the language of *Tot* v. *U. S., supra.* In so many words, they say *this is not permissible* * * * that is, *it is not permissible to put on the defendant the burden of proof,* that the presumption of innocence is a matter of due process of law, that to destroy that presumption of innocence by some evidentiary subterfuge violates the 14th Amendment of the Constitution of the United States. This is not a mere question of an indictment, *Hurtado* v. *California,* 110 U. S. 516, 4 S. Ct. 111 and 282. This is not a mere question of whether or not the state can appeal, *Palko* v. *Connecticut,* 302 U. S. 319, 58 S. Ct. 149. This is not a mere case of whether or not a defendant must testify if commanded by the State, *Twining* v. *New Jersey,* 211 U. S. 78, 29 S. Ct. 14. This is not a mere question of whether or not a person is entitled to a jury trial, *Maxwell* v. *Dow,* 176 U. S. 601, 20 S. Ct. 448. This is not a mere question of whether or not a District Attorney can comment on whether a man testifies, *Adamson* v. *California,* 332 U. S. 46. 67 S. Ct. 1672. This is not a

mere question of whether a man is entitled to a trial after he has been convicted on whether or not he is insane, *Phyle* v. *Duffy, supra, Solesbee* v. *Balkcom, supra.* This is not even a question of whether the 1st Amendment to the Constitution of the United States applies to the states, *DeJonge* v. *Oregon,* 299 U. S. 353, 57 S. Ct. 255. This is a question on the substance of due process of law. This is a question which goes to the very heart of the 14th Amendment. This is a question of whether or not the State of Oregon can, by rigging the important processes of legal trial, deprive a person of a fair trial. A failure to throw out these statutes is to violate the 14th Amendment of the Constitution of the United States. Can precedent permit the creation of this presumption just so long as the form of a trial is accorded? The 14th Amendment of the Constitution of the United States accords the substance not the form of process. See *Mugler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273.

Regardless of Kind of Tribunal, Due Process Would Be Denied:

In considering this point the Court should bear in mind that it makes no difference whether or not the defendant is tried by a Court sitting alone, a panel of experts, or psychiatrists, or a jury. We are not questioning anything but the burden of proof. In any one of the aforementioned types of trial the defendant would be met by the same problem. Each trial agency would be bound by the same rule of proof. We are not therefore basing our contention of this assignment of error on any of the first ten amendments of the Constitution of the United States but rather we place it squarely on the due process clause of the 14th Amendment and assert that here is an instance where due process has been denied. The process accorded was not due process and was calculated in effect to totally deprive the dependant

of the right to assert a substantial defense to a crime charged. In the case of *Herbert* v. *Louisiana*, 272 West 312, 47 S. Ct. 103, 48 ALR 1102, Justice Van Devanter stated with regard to the 14th Amendment:

> "What it does require is that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and that not infrequently designated 'the law of the land'. Those principles are applicable alike in all states and do not depend or vary with local legislation."

We can state that it would make no difference whether or not a panel of experts or the Court itself were to consider the question presented to the jury in the Circuit Court of Multnomah County, if they were governed by the same burden of proof. They would have to under the law of the State of Oregon say the defendant could not rely on his type of insanity as a defense to the crime; and, further, that even though he could so rely or even though he may have proven that he might probably have been insane under the Oregon law, that there would always be a reasonable doubt whether or not he did the act charged while suffering under the disability of insanity. Barring a completely degenerated mind, which degeneration would probably have to be evidenced by some objective and non-psychiatric symptom, it would be impossible to prove a person insane under the Oregon law.

The argument set forth above does not ignore the fact that there has been a development of various theories regarding how far the 14th Amendment of the Constitution of the United States goes, both as to protecting citizens of the United States and as to the due process clause. We think that the question involved does not depend on any of the amendments constituting the Bill of Rights but rather

squarely falls within the purview of the due process clause of the 14th Amendment of the Constitution of the United States.

If this assumption needs any support, and we think it is apparent on its face, we again cite the Court to the case of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241. In this case the defendant was convicted of having firearms in his possession after having been convicted of certain felonies. There was a statute passed by Congress which created a presumption that a person having said firearms in his possession was presumed to have received said firearms through interstate commerce. Defendant was convicted, and there was no proof other than presumption created by this statute. The Court held that this presumption was invalid and violated the due process law of the 5th Amendment of the Constitution of the United States and said as follows:

> "That Congress has power to prescribe what evidence is to be received in the Courts of the United States. The section under consideration is such legislation. *But, the due process clauses of the 5th and 14th Amendments set limits upon the powers of Congress and that of the State Legislatures to make the proof of one fact or group of facts evidence of the existence of the ultimate fact in which the guilt is predicated.*" (Italics added.)

The Court goes on to say on page 469,

> "It might be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the Legislature might validly command that the finding of an indictment or the mere proof of the identity of the accused should create a presumption of the existence of all facts essential to guilt. *This is not permissible.*" (Italics added.)

Other Constitutional Rights Violated:

In placing the argument of this assignment of error squarely within the Due Process Clause of the 14th Amendment, we do not mean to imply that it does not come within the Privilege and Immunities Clause thereof. See *Slaughter-House* cases, 16 Wall (U. S. 36). The excellent dissenting opinion of Mr. Justice Black in the case of *Adamson* v. *California,* 332 U. S. 46, 67 S. Ct. 1672, discusses at great length whether or not the Privilege and Immunities Clause and that part of the 14th Amendment making citizens of the United States citizens of the state in which they reside, should apply as restrictions on the states and extend the first ten Amendments as restricting the states. Certainly it can be sustained by logic and reason; however, the oft repeated decision of the majority of this Court that they will not extend the same, cautions us to place the onus of our argument on the fact that due process itself is involved in the decision of the case at bar.

Nevertheless we feel that the deprivation of the rights guaranteed to appellant herein is of such an extreme nature that it also deprives him of his rights as a citizen of the United States. It is such a deprivation of civil rights that the Federal Government has protected by constitutional provision and legislation.

To summarize this argument let us say: That where a single jurisdiction requiring such a burden of proof which runs counter to all the background of criminal law and the constitutional development in this country, it devolves upon the reviewing authority to scrutinize the matter closely. When we add to this the oft repeated criticism of the Supreme Court of the State of Oregon and the Bar of the State of Oregon against the rule of the burden of proof and the rule denying the right to prove a certain type of insanity, there rests a presumption that there is something basically wrong with the Oregon law and that it offends the Consti-

tution of the United States. This presumption we feel requires the State of Oregon to go forward and show some reason other than the repetition of precedents or citation of cases showing the justified reluctance of this Court to overrule the State decision. The state is required to argue principles not precedents and we feel that the principle and logic of the argument is so overwhelmingly in our favor that we must prevail on this point.

ASSIGNMENT OF ERROR NO. TWO:

The Courts below erred in upholding the refusal of the trial Court to make available to defendant's counsel before trial a confession taken from defendant before he was advised of his right to be represented by counsel and before he was taken before a magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment to the United States Constitution.

Oregon Laws, Section 26-1542. *Prisoner to be taken before magistrate: Proceedings of magistrate.* If an arrest is made in this state by an officer of another state in accordance with the provisions of Section 26-1541, he shall, without unnecessary delay, take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested.

Section 26-1547. *Rights of defendant: Information as to charge: Aid of counsel.* When the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel, before any further proceedings are had.

Section 26-1556. *Statement of defendant: Informing defendant of right to make statement.* When the examination of the witnesses on the part of the state is closed, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

ARGUMENT

Oregon Rule Destroys Rights Guaranteed by Statutes and 14th Amendment:

We respectfully submit that the conduct on the part of the State of Oregon with regard to the prosecution of this crime did not accord with the limitations of the 14th Amendment. We have particularly assigned under this assignment of error the failure of the District Attorney to permit the appointed counsel of defendant-appellant to see or examine the confessions taken from defendant before he was aware of his right to counsel, and before he had been taken before a Magistrate as required by Oregon law, Section 26-1542 OCLA; and informed of his right to counsel, 26-1547 OCLA; and right not to make a statement, 26-1556 OCLA.

As is required by the Oregon law set forth in our brief, in the Court below, a person charged with a crime should be taken immediately before a Magistrate and informed by him of his right not to make a statement and his right to counsel if he so desires. The law has been negatived and the effect of it destroyed by the case of *State* v. *Butchek*, 121 Ore. 141, 253 Pac. 367. This case stated that it is proper for an officer to question a person before he has been taken before a Magistrate, and that the officer did not have to tell him that he had a right to counsel nor warn him that what he might say might be used against him. Resulting from this de-

cision are a line of cases in the Oregon Courts which finally culminated in the case of *State* v. *Folkes*, 174 Ore. 568, 150 P. 2 d. 17, in which a Negro defendant charged with rape made a confession, after a long questioning, and on the promise of being taken to see his mother and given a meal of pork chops and a pint of whiskey. As a result of such a confession, the defendant was sentenced to death and executed for a rape murder allegedly having taken place on a train in Oregon during the war.

State Fully Prepared Before Defendant Allowed Counsel:

This is not a case in which we were accorded the spirit of due process of law. The defendant was kept awake for a period of at least 32 hours. He was not taken to a Magistrate until after he had made two confessions and until after the State's case was completely prepared; and he was induced to make a confession by the vicious representation on the part of the State's Attorney and the Chief of Detectives of the Portland Police Force that *he could use the confession in the preparation of his case.* In so many words, as quoted from the transcript of testimony, they told him that the confession could be used *for or against him.* See transcript of testimony, pages 119, 129, and 143. This is unequivocally established by three different statements in the record.

Several days after the taking of the confessions and after his indictment by the Grand Jury of the State of Oregon, the Circuit Court of the State of Oregon for the County of Multnomah, appointed counsel to serve on behalf of the defendant. Under the Oregon statute counsel are allowed a nominal fee, which in this case has long since been exhausted in out-of-pocket expenses by counsel which have not been compensated by the Court. We want to call the attention of this tribunal to the fact that the reality of complete representation has not been accorded the defendant. We are

serving in this capacity within the limits of our capabilities, and o' substance, and will see that the spirit of the Constitution of the United States as expressed in the 14th Amendment is complied with even though it may result in a personal sacrifice on our part.

The question becomes important however when we reflect on the fact that when counsel were appointed for the defense of the defendant, and when they began the investigation of the case, they were refused access to the confession that had been taken from the defendant before he was given a preliminary hearing, before he knew that he had a right to counsel, before he was warned of his rights with regard to making a statement and on the pretext that he could use the same for him or against him. We asked to see this confession and were refused. Counsel for defendant have represented several persons charged with crime in the State of Oregon. It is the first time that we were refused cooperation from the District Attorney's Office in the County of Multnomah, State of Oregon. It was the first time that we were not given every consideration in the trial of a case. It was the first time counsel was appointed in a case which was headline news in the State of Oregon over a period of several days and which was stirred up in particular by the Oregon Journal as appears in our first assignment of error in the Court below and which is not a matter of issue here. See brief below, page 14 et seq.

Court Refuses to Consider Motion:

When met with this proposition and this unusual conduct on the part of the District Attorney's Office, counsel filed a motion for continuance and to be permitted to see the confession. The motion for continuance was twice denied. The first time a token continuance was allowed but in reality the motion was denied. The second time the motion was denied in its entirety. The motion to see the confession was

denied in a peremptory manner and without the Court even so much as examining the confession. It was denied in such a manner that the argument of counsel was dismissed with "I know of no reason why you can see the confession" (See transcript page 51), and we were not permitted to state the strong grounds upon which we demanded the same. It might be here interjected that at the time we did not know that they had told our client he could use the confession during this trial and that it could be used for or against him as testified to by Captain Brown. If we had had this information the picture might possibly have been changed. We also renewed our demand when this information was available and asked that the confession be excluded. It suffices to say that we were dealing with a subnormal mentality which was not capable of assisting in its own defense and that our information was not complete with regard to the confession. This is just one of the incidents that we suffered from in the preparation of the case and it certainly is significant and typical of the problem with which we were faced.

Effective Counsel Guaranteed:

The case of *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, establishes that a person charged with a crime has a right to effective counsel and that the failure of the Court to accord that person that kind of counsel is violative of the 14th Amendment of the Constitution of the United States. As a corollary of this right to counsel, the counsel appointed to defend the party charged has a right to due process of law in defending the party charged. We will assume that this right is a real one and not a formal or unsubstantial thing. We will claim in this assignment of error that counsel was appointed late in the case and after the State's case had been completely prepared and after the State had thoroughly imposed on the affliction of defendant. We will claim, and we

believe the facts will prove, that this imposition was deliberate, that the preparation of the State's case was hurried in order to avoid the defendant's being represented by counsel; and that once having taken this case into its hands and completely tied the matter up in their own minds, the State of Oregon, fearful of adverse publicity by an excited press, did not dare to permit the appointed counsel to see the confession made. The reason they did not dare is that the confession itself, if it had been properly given to a psychiatrist for consideration, would have shown that the defendant did not know the difference between right and wrong, did not have the capacity to commit a crime, was insane, was suffering from a disease as real as a broken bone. The confession itself reflected all these facts, and if the defendant had been accorded the right to use it for himself as was promised when the confession was taken, the defendant would not have been condemned to death in the lethal chamber. One of the most vital issues in the case was whether or not defendant acted on the spur of the moment or after deliberation. The confession itself contained the statement:

> "Q. Well, when you killed her, what made you make your decision that you should kill her?
>
> "A. It just came to me (snapping fingers), just the second she started screaming." (Plaintiff's exhibit 15. Tr. of Rd. 363.)

See the whole exhibit 15 for the full importance of this error.

14th Amendment Violated:

This Court has spoken quite emphatically with regard to the improper taking of a confession. See *Malinski* v. *New York*, 324 U. S. 40, 65 S. Ct. 781; *McNabb* v. *U. S.*, 318 U. S. 332, 63 S. Ct. 608. There has been a tendency to modify the holding of the *McNabb* case which was primarily based on the requirements of the Federal Code of Civil Procedure

when the states have not accorded to the defendants charged with crimes against their sovereignty the protection of being taken before a Magistrate and informed of the right to counsel and informed of their right against self-incrimination. There is, so far as we have been able to determine, no clear cut statement by this Court that when a state guarantees certain basic rights in their statutes, as does the State of Oregon, that these statutes can be circumvented as they have been in the case of *State* v. *Butchek, Supra,* and the subsequent cases of the State of Oregon culminating, in the opinion of counsel, in the gross injustice of *State* v. *Folkes, supra.*

Whether or not the provisions of the 14th Amendment extend in protection of the Bill of Rights to these confessions, or whether or not the principles of "natural justice" would command this Court to negative the improper taking of a confession is not the crux of the argument. We feel that the conduct of the State, assigned as error herein in depriving the defendant of effective counsel, deprives the defendant of due process and certainly deprives him of his civil liberties as a citizen of the United States, which is protected by the Privileges and Immunities Clause of the 14th Amendment of the Constitution.

The case of *Powell* v. *Alabama, supra,* requires that a person is entitled to *effective* counsel. There are other cases subsequent to this so-called *Scottsboro* case which have re-emphasized this right to counsel as being a part of due process. We consider the action of the State of Oregon brash in depriving the defendant herein of effective counsel by denying the counsel the right to examine and use the confession taken, particularly when the same was taken on a pretext that it could be used for him or against him as will be hereinafter shown. Remember, also, counsel were attempting to defend a sub-normal and insane person, unable to effectively assist them in the defense.

Error Prejudicial:

That our inability to use the confession was a matter of substantial importance in the trial of the case will be shown by a reference to the opening argument of the case by Mr. Ryan. (See Tr., page 52):

> "Mr. Ryan: Ladies and Gentlemen, in a case of this kind the defendant's attorney is at a particular disadvantage by virtue of the fact that the evidence in a case of this type is entirely in the hands of the District Attorney's office. We have made request to the District Attorney's office personally, we made a request before the court here before the trial started the other day, and we renewed that request this morning——
>
> "Mr. Collier: Just a minute, your Honor——
>
> "The Court: Mr. Ryan, your statement is objectionable. Matters addressed to the court are no concern of the jury. It is the court's responsibility. I say, of no concern to the jury, except as matters might later be presented to the jury in some form or manner. You may proceed.
>
> "Mr. Ryan: I am trying to say, Ladies and Gentlemen of the Jury, we don't know what Morris Leland stated to the police officers or stated in his confession. We don't have that information."

The further effect of this refusal is of probably greater importance, because the defendant's counsel were not able to have adequate psychiatric advice on the condition of mind that the confession elicited regarding the defendant and the further problem in preparing the direct examination of the defendant's psychiatrist.

Modern and Majority Rule Supports Appellant:

The additional reasons why this amounted to the denial of due process will be set forth more fully as this argument is developed.

There are many cases in which the question of the right to

examine a pre-trial confession or other evidence in the possession of the District Attorney has been decided. In an annotation in 52 A.L.R. commencing on page 201, some of these cases are discussed. There are two Oregon cases involved before the case at bar, *State* v. *Yee Guck*, 99 Ore. 231, and *State* v. *Brake*, 99 Ore. 310. Both of these cases base the question of the right to a pretrial examination on whether or not the evidence sought to be examined is admissible. Naturally this evidence has been deemed admissible by virtue of the fact that it was admitted into evidence. We are aided in this question by a statute, *10-401 OCLA*, which we claim gave us this right.

> "10-401. *Inspection of books and papers.* The court or judge thereof, while an action or suit is pending, may order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under action or suit, or the defense therein. If obedience to the order be neglected or refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying thereof, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party so neglecting or refusing as for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness."

If this statute had been non-existent we would still have had the right under the Privileges and Immunities Clause of the 14th Amendment and Due Process Clause of the 14th Amendment to the Constitution of the United States. The reasoning of the weight of authority and the more modern rules as annotated in the above citations from 52 A.L.R. is set forth in the case of *State* v. *Tippett* (Mo.), 296 S.W. 132, as follows:

"The general rule denying the inspection of documents in the hands of an adverse party has been greatly relaxed in modern cases. In civil cases an inspection of documents in the hands of opposing parties . . . upon motion, has been allowed. The cases seem to hold that it is a matter of indifference whether the document to be examined may be of actual benefit to the party filing the motion to inspect. If from the motion the document may be material, the right of inspection obtains . . . We are unable to perceive why the privilege should not obtain in a criminal case, although we have been unable to find an authority in point . . . That it was desired that the state's evidence remain undisclosed partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be, and is, too jealous of according a defendant a fair and impartial trial, to hinder him in intelligently preparing his defense and in 'availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial."

The Louisiana court has passed on this question and reversed earlier decisions on the ground that their earlier decisions denied due process of law. See *State* v. *Dorsey*, 207 La. 928, 22 S. (2nd) 273:

"Under the provisions of the Constitution of the United States and this state, every accused is entitled to, and is guaranteed, a fair trial, and to deny his counsel a pre-trial inspection of the accused's written confession is, in our opinion, tantamount to depriving such accused of a fair trial, and is in violation of his constitutional rights. This being so, Section 976 of the Revised Statutes must yield insofar as it may deny this right."

This was a case which was almost on all fours with the case at bar excepting insofar as there was no representation by the police that the defendant could use the confession in

the preparation of his case and in the trial of his case, nor was the defendant sub-normal and insane. Thus our case is a stronger one than this cited case which emphatically states that the Constitution of the United States gives this right to pre-trial examination.

Court Failed to Exercise Any Discretion:

In the case at bar the Supreme Court of the State of Oregon acknowledged that the statute, *10-401*, applied to criminal cases. See *190 Ore. at page 615*. The Supreme Court also sought to justify the upholding of the conviction herein by reasoning that the refusal of the lower Court to grant an examination of this confession was not an abusive discretion. Nowhere did they consider the insupportable argument by the District Attorney that this confession was his own property. See transcript page 50. They instead based their decision on its being a matter within the trial court's discretion. They did not discuss whether or not the trial court exercised any discretion. They did not consider that the trial court did not even so much as look at the confession, let alone read it. They did not examine the record of the case to see that the trial court's approach to the problem was one of non-concern, and its decision of the problem was peremptory dismissal which shows even today on the cold record of the case that no discretion was exercised. The matter was never really considered, the motion of counsel for defendant was treated as an annoyance and not something that required the exercise of judicial discretion.

Confession Induced by Fraud:

Absent from the consideration of this question was the three-times repeated statement by the State that the confession was taken on the representation that it could be used for or against the defendant. Counsel is confounded by what appears on pages 616 and 617 of 190 Oregon regard-

ing the Court's discussion of this question. It is sandwiched in without explanation or decision and conveniently ignored.

Use of Confession Necessary to Fair Trial:

The lower Court goes on to discuss the question of whether or not the failure to have the confession available to counsel for defendant injured counsel for defendant in the trial of the case and goes on further to say that the confession was introduced sometime before Dr. Dixon testified. Neither of the counsel for defendant had had a murder case. It is unfair, arbitrary and a deliberate ignoring of the practicalities of the trial of the case to expect counsel to withdraw from evidence, in the few hours accorded them for rest and the preparation of the next day's trial, and discuss a confession with a psychiatrist who; as the record of this case will disclose, is difficult to contact. The Court seems to excuse itself by this reasoning. The Court entirely ignores the fact that the whole trial of the case turned around this confession; that the tenor of the questioning of the jurors on the voir dire, the opening statement and the questioning of all the witnesses prior to the introduction of this confession turned around it. The importance of the confession can be only understood when the Court reads the confession and finds that this alone was the evidence of the commission of the crime and the State of the defendant's mind at the time.

The casuistry indulged in by the Supreme Court of the State of Oregon in avoiding a reversal on this point is only exceeded by that Court's avoidance of the question of the burden of proof in our first assignment of error. A reading of the case will indicate even to a person casually interested that the Court was unsure of this point but felt that it must be disposed of contrary to the interests of the defendant. Counsel represents to this Court that they sincerely

feel that had they been permitted a pre-trial examination and use of the confession that the verdict in the case at bar would have been different and the defendant would not be now condemned to death.

The lack of confidence of the District Attorney in his stand on this question is limned by the only argument he could summon on the motion, to-wit: that it was his own private property. The Supreme Court didn't even deign to discuss this question. We feel that had we known at the time of the argument of the original motion of the representations of Captain Brown of the Police Force, that perhaps the Judge might possibly have been moved to be more concerned and have informed himself sufficiently to be able to exercise a modicum of discretion. We know that after the trial had progressed he did not want to reverse his original decision because perhaps it might have cost the County of Multnomah for the State of Oregon a few hundred dollars to retry the case. This question presents to this Court a problem which has not arisen before.

It suffices to say there is a definite split of authority in the state decisions, and that those holding against our contention do not consider the question of the violation of the 14th Amendment to the Constitution by a refusal to permit the examination requested herein. The better reasoned cases, however, do discuss this question; and, in order that appointed counsel be effective in protecting the rights of their client, this right is essential.

The states in their own constitutions and statutes give certain rights and protections that are symbolic of due process of law. If in the decisions of the cases such as *State* v. *Butchek* and *State* v. *Folkes*, *supra*, these rights are vitiated and these protections rendered nugatory, it is incumbent upon the Court of final resort on questions involving the United States Constitution to render them effective. The rules set down in the *McNabb* case grew out

of the Code of Federal Criminal Procedure. They are not, however, unimportant when it comes to the consideration of the bare minimum of substantial justice that a state must accord.

From personal experience counsel know that a metropolitan police force convicts persons by obtaining confessions either legally or illegally. One of the principles of good police work is to preclude a person from seeing an attorney or getting even an inkling that he is entitled to any right until the case is tied up in a neat package. *State* v. *Butchek, supra,* and *State* v. *Folkes, supra,* implements this purpose. They defy the spirit and substance of the constitutional protection of due process of law and of the national citizenship, that each state citizen enjoys. There must be a limit somewhere. There must be an instance where the Federal Constitution gives protection of a real nature. Certainly in the case at bar we have an extreme instance of the imposition of police methods on the defendant. Standing by themselves they would no doubt render questionable the validity of the confession taken, but coupled with the fact of the request by defendant's counsel when appointed of a right to examine the confession (which at that time counsel thought was only one confession) the question becomes a basic one and requires this Court's action. Add to it the problem created by the unequivocal representations that the defendant could use this confession, we have a confession as much obtained by force, by denial of due process as any of the cases which this Court has considered. This confession was in fact obtained by fraud.

We again allude to the failure on the part of the Supreme Court of the State of Oregon to discuss logically the questions we here raise and we again state that this is typical of the prosecution of the case in both of the lower Courts.

Either there is a right of an ignorant, subnormal, insane person to have some real protection or we should drop the

masquerade and admit that the states are free to impose themselves on those who are stupid or unfortunate enough not to know their rights. Either we should admit that the appointment of counsel is an empty form to be fulfilled after the state has an ironclad case, or we should give that appointed counsel effective weapons with which to prove the facts of the case. This assignment of error is vitally connected with our first assignment of error and is typical of the prosecution of mentally sick unfortunates under Oregon law.

We submit that this assignment of error has shown a deprivation of defendant's rights under the 14th Amendment of the Constitution and by itself justifies, indeed requires, a reversal of the Courts below.

ASSIGNMENT OF ERROR NO. THREE:

The Court below erred in sustaining defendant's conviction and sentence to death in the lethal chamber.

ARGUMENT

We have assigned error in the general conduct of the trial below and while we are not discussing in detail this error we call the Court's attention to the failure of the Supreme Court of the State of Oregon to accord due process of law in the errors assigned therein. See statement of facts and briefs in the Court below.

As herein stated, we are not relying on this assignment of error to determine this Court's decision and we will not burden the record with an argument at length on it. The substance, however, is well demonstrated in the fact of the admission of such ugly and emotion provoking exhibits as gruesome pictures, a bloody knife, torn and bloody clothing, and a long and detailed testimony by the morgue's physician, said testimony being in front of the jury, holding a picture of the naked and torn body of the defendant before

them while he testified to facts that had no relevance to the admitted issue of the case. We know that under this assignment of error this Court will not reverse the case, but this assignment of error does tend to show the atmosphere under which counsel labored to discuss a fact, which if it had been approached unemotionally and by an unbiased and unprejudiced jury, would unquestionably have been decided on the medical evidence, the documentary evidence, and other evidence tending to show defendant's insanity.

Conclusion

This case is more important than the fate of the defendant, not that his fate is to be disregarded. It will demonstrate whether or not a state can ignore scientific reality, a fair trial and due process of law as we have shown it has been ignored herein. We know that the State of Oregon in answering our brief will rely on precedent and the natural reluctance of the Supreme Court of the United States to overrule an established legislative or judicial law of a state. We cannot here conceive of any logic or principle which can supply force to the anticipated argument. We will not discuss here the fact that some persons in times gone by have said that if we accorded protection of the defense of insanity to all persons who were mentally ill we would have insane asylums in every county. It suffices to say that we have permitted the ugliness of sex crimes, of senseless murders, vicious robberies, and untold petty offenses to continue because states such as Oregon through inertia or by force of prejudice have refused to look reality in the face. These states have refused to accord to persons charged with a crime due process as is directed under our Constitution and the ethics of Western Civilization, that due process which says that a person cannot be found guilty unless he is at fault. A repetition of such a holding in this Court will be indefensible. It will be just as causative of future rape-

murders as was the tragic negligence of the Oregon State Hospital in discharging this man because they were crowded.

The counsel represent that they feel deep pride in being accorded an opportunity to help define a question as basic as this, and they express faith that their concept of the moral dignity of any human being, however debased by disease, will be recognized under the laws of this nation. They believe that the Constitution of the United States is not a historic document but is rather a vibrant charter, protecting and expanding the rights of the citizens of this great land. They believe that it will accord substance rather than form and will not hide itself in a scabbard of precedents nor blunt its force against the wall of unconcern and prejudice that envelops such cases as this. We are convinced it will cut through the confusion of this and other similar cases to the core of reality and afford real justice.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 176.

MORRIS LELAND,

Appellant,

vs.

THE STATE OF OREGON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

REPLY BRIEF OF APPELLANT

THOMAS H. RYAN,
ANTHONY PELAY, JR.,
JOHN D. RYAN and
HAROLD L. DAVIDSON,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,

Appellant,

vs.

THE STATE OF OREGON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

REPLY BRIEF OF APPELLANT

Reply to Appellee's Answer to Appellant's Assignment of Error No. One

"ASSIGNMENT OF ERROR NO. ONE

The courts below erred in upholding the validity of Oregon's statutes regarding the proof of insanity despite defendant's contention that said statutes, 26-929 and 23-122, OCLA, deprived defendant of his life and liberty without due process of law as guaranteed under the 14th Amendment to the United States Constitution; in that defendant was required to prove he was insane

> beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as a defense to a crime."

Appellant in urging this assignment of error does not question the right of the state to determine the form of process. What is questioned is whether the process afforded is due process; or, in the case of the particular type of insanity from which the appellant is suffering, any process. If due process was not afforded, then the laws of the State of Oregon violate the 14th Amendment to the Constitution of the United States. The citation of cases by appellee regarding this case does not require an answer. We must, however, point out that our agreement with the rule does not imply that the rule is pertinent to the facts here put in issue. Rather, we would say that the process supplied in Oregon, in the language of Mr. Justice Frankfurter in *Adamson* v. *California*, 332 U. S. 46, 67 S. Ct. 1672, would . . .

> "offend those canons of decency and fairness which express the notions of English speaking peoples even towards those charged with the most heinous offense."

The state would have this Court believe that there is little difference between the rule in Oregon and the rule in those states which would require the defendant to prove his insanity by a preponderance of the evidence. To state such a proposition is to answer it. We will not again call the attention of this Court to the extremely difficult proposition to be proven and the great variance in the opinions to be elicited as to a particular person's condition. Proof beyond a reasonable doubt of insanity is in fact an impossibility. It would make no difference whether this proof were to a jury, a Court, or a panel of experts. The same impossibility would attend the burden placed upon the defendant by the State of Oregon. It would in effect deny due process.

With reference to 23-122, our so-called "morbid propensity" statute, our attack on the same does not require us to assume the so-called irresistible impulse rule. Rather, we are attacking the requirement that insanity is a purely intellectual condition and limited to the *knowledge* of right and wrong. In this case the defendant has a defect of volitional power and he, because of said defect, is unable to appreciate the reality of right and wrong. If this is a morbid propensity to commit a crime, this propensity in itself is a disease; and to punish a man for a disease offends our ideas of justice and indeed is a wrongful act by the sovereign. It certainly violates the 14th Amendment of the Constitution of the United States.

Our argument criticizing the refusal of the State of Oregon to keep abreast of scientific reality has not been answered. If our Constitution permits a state to ignore scientific reality and medical fact, then the process applied can only operate in a field of legal fiction. That process is far from being due process, and if it were not for the terrible consequences of such stubbornness to the party suffering therefrom, would make the state and its process a fit subject of ridicule.

Again we repeat that the State has no right to punish unless there is fault. The effect of 23-122 OCLA is to permit such punishment. We do not urge the irresistible impulse rule nor do we say the state would have to abandon the right and wrong rule. We only say that when the state accords process, it must be a real process and must appreciate the realities of scientific fact and medical progress.

Appellant contends quite strongly that, over and above the problem of the defense of insanity, the effect of the presumption of insanity being on the defendant, particularly in a case of first degree murder, shifts the burden of

proof from the state to the defendant. How can we expect a jury to make a fine distinction between the willfulness required to convict a man of deliberate and premeditated murder and the lack of ability to will from which he suffers in this particular type of insanity? First degree murder requires premeditation and willfulness, both of which are essential and long recognized elements of that crime. The effect of the rule requiring the defendant to prove his insanity even by preponderance of the evidence confuses the issue and does shift the real burden of proof. Under the Oregon rule, the confusion is even greater as that is the same burden of proof by which the state has to prove the crime.

Assume that the affirmative defense of self-defense were required to be proven by a preponderance of the evidence, or, as in Oregon, by beyond a reasonable doubt. Would this Court then say that the burden of proof had not shifted and that the presumption of innocence was destroyed?

The State contends that there is no legal support to the fact that the burden shifted to the defendant. On the contrary the majority of the States so hold. Typical of the rule of those cases is the holding in the Federal rule in the case of *Davis* v. *United States*, 160 U. S. 469, 40 L. Ed. 499.

> "Upon whom, then, must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and

avoidance, for *it is a plea that controverts the existence of every fact essential to constitute the crime charged.* Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

* * * * *

" . . . But to hold that such presumption (of sanity) must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, *is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.*

* * * * *

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. *If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged.* His guilt cannot be said to have been proved beyond a reasonable doubt—*his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable*

of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?'' (Emphasis added).

See also People v. Garbutt, 17 Mich. 9, in opinion by Mr. Justice Cooley in which is stated as follows:

"It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defense, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defense of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defense, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond a reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a preponderance of testimony, that he was incapable of criminal intent at the time the act was done . . . *These cases overlook or disregard an important and necessary ingredient in the crime of murder; and they strip the defendant of that presump-*

tion of innocence which the humanity of law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered . . ." (Italics added)

See also the case of Hopps v. People, 31 Ill. 385.

". . . In every criminal proceeding before a jury, without any exception, if a reasonable doubt is entertained of the guilt of the accused, the jury are bound to acquit, Now, what is essential to the commission of a crime? Our statute declares, to constitute crime, there shall be a union or joint operation of act and intention, or criminal negligence. The overt act is one ingredient, the intention another, and their union is indispensable to constitute guilt. Intention is proved by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. The killing alone, under the most aggravated circumstances, will not suffice, if sound mind and discretion be wanting. Sound mind is presumed, if the accused is neither an idiot, lunatic, 'nor affected with insanity.' If he be affected with insanity, then sound mind is wanting, and crime is not established. *Sound mind, or sanity, then, is an ingredient in crime, quite as essential as the overt act.* Who will deny, if there be a reasonable doubt as to the overt act, that the jury are bound to acquit? Equally imperative must be the rule, if a reasonable doubt be entertained as to the sanity of the prisoner. *Sanity is guilt, insanity is innocence; therefore, a reasonable doubt of the sanity of the accused, on the long and well-recognized principles of the common law, must acquit.* Suppose the question was one of identity, would not a reasonable, well-founded doubt on the point, acquit the prisoner? Suppose an alibi was sought to be proved, and proof sufficient was offered, to create a reasonable doubt whether the accused was at the place, and at the time, when and where the offense was alleged to have been committed, is not the prisoner entitled to the benefit of the doubt? So,

if the defense be that a homicide was justifiable or excusable, is not the principle well settled, a reasonable doubt will acquit? The rule is founded in human nature, as well as in the demands of justice and public policy. *Innocence is the presumption; guilt being alleged, the State making the charge is bound to prove it;* the State is bound to produce evidence sufficient to convince the mind of the guilt of the party. If a reasonable doubt is raised, then the mind is not convinced, and being in that unsettled state, whatever the probabilities may be, a jury cannot convict. It is entirely impossible for them to say the accused is guilty, when they entertain a reasonable doubt of his guilt.

"It is urged by the prosecution, that the burden of proof is on the accused, to make out his defense. That sanity being the normal condition, insanity must be established by preponderating evidence.

"*We do not understand the burden of proof is shifted on the defendant.* Every man charged with crime, is entitled to claim the benefit of all the provisions of the law. In every case of murder the first inquiry is, has the homicide been committed—did the prisoner do the deed—did he intend to do it—was he of sound mind and not affected with insanity when the act was done, and was the act done with malice aforethought, express or implied? These are, all of them, affirmative facts and must be proved by the prosecution. The State avers their existence—they are all essential to constitute the crime, and the State must prove them—the burden of proof is on the State. But it is said, the State is relieved of the burden by proving the prisoner did the act, the law implying that he intended to do it, and that the presumption is, every man is of sound mind. *These are but presumptions, and when they are rebutted by proof of absence of criminal intention, by reason of unsoundness of mind or a reasonable doubt is raised on the point, that doubt must avail the prisoner. Can it be properly said, in criminal cases the burden of proof ever shifts, so long as the defendant bases his defense on the denial of any essential allegation in the indict-*

ment? We think not. The prosecution is bound, on every principle of correct pleading, and of justice, to maintain their allegations; and it is not in their power to shift the burden on to the defendant. Commonwealth v. McKie, 1 Gray (Mass.) 61. *The presumption of innocence is as strong as the presumption of sanity. The burden of proof must, therefore, always remain with the prosecution to prove guilt beyond a reasonable doubt*—a serious and substantial doubt, not the mere possibility of a doubt.

"The rule here announced, differs from that laid down in Fisher's case, 23 Ill. 293. In that case we said, sanity being the normal condition, it must be shown by sufficient proof, that from some cause, it has ceased to be the condition of the accused. The opinion in that case, was prepared under peculiar circumstances not admitting of much deliberation, and this point was not pressed upon the attention of the court, or argued at length. Further reflection has satisfied us, it was too broadly laid down, and that justice and humanity demand, the jury should be satisfied, beyond a reasonable, well-founded doubt, of the sanity of the accused. The human mind revolts at the idea of executing a person whose guilt is not proved, a well-founded doubt of his sanity being entertained by the jury."

There are many other cases that could be cited, but suffice it to say, that the majority rule in the country and the rule of good sense is that the burden proving sanity is so entwined with the question of willfulness and premeditation that the Oregon rule is shifting the full burden to the defendant and deprives the defendant of his presumption of innocence. This court has held that the presumption of innocence is an integral part of due process. See *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241.

To treat insanity as it is treated in Oregon is much more violative of the principle for which these cited cases stand then the treatment by those states which merely require

the proof of insanity by the preponderance of the evidence. Yet counsel feels that even in those states the burden is shifted to the defendant, and his presumption of innocence is destroyed. In the question of a crime in which the willfulness and specific intent are essential elements, this presumption of innocence becomes a mockery as the state is in reality relieved of this burden by the Oregon rule and even by the less stringent rules of the minority states. This fact is well recognized in many cases including those above cited.

To sum up the Oregon statutes governing insanity are indefensible. That Oregon alone requires proof beyond a reasonable doubt of insanity places on the appellee herein a strong argument to pursuade by reason why such rule should not be unconstitutional. The Court will not tamper with state procedures so long as they afford due process, but this goes to the essence of process and appellee has failed to meet the challenge which we offered in the conclusion of our first brief. They support their argument only by the reluctance of the Court to interfere with state procedure. They do not support their argument by reason. They attempt to claim that the defendant is suffering from an emotional disturbance and would like to departmentalize the mind of the defendant and say that so long as he is sane in one department, even though he may be insane in another department, that he may be punished. There is no excuse for Oregon having this burden of proof. There is no excuse for Oregon to adhere [redacted] rule which contradicts the learning of medical sci[redacted] There is no question but this has deprived defendant of [redacted] process of law.

Bear in mind in considering this aspect of the case that the presumption created by Oregon law applies to persons who, if their claim is true, are by virtue of their disa-

bility unable to aid in their defense. In this case it is established that the defendant is subnormal and suffering from a mental disease. What chance has he to sustain the impossible burden placed upon him?

Reply to Appellee's Answer to Appellant's Assignment of Error No. Two

"ASSIGNMENT OF ERROR NO. TWO

"The Courts below erred in upholding the refusal of the trial Court to make available to defendant's counsel before trial a confession taken from defendant before he was advised of his right to be represented by counsel and before he was taken before a magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment to the United States Constitution."

We agree with counsel that under the enunciations of the cases cited by them with reference to the taking of confessions by force that the confession in this case should not be excluded on that ground other than by analogy. This confession was taken by fraud. The fraud was that it was represented to the defendant that the confession could be used for him or against him but when a request was made to examine the confession, that was denied.

It is no answer to this argument that in order to blunt the possibilities of error that counsel were offered the right to a short recess after the confession was offered in evidence. This was not a recess by which the case could be postponed for a day or so, during which time counsel could consult with the psychiatrist who was advising them and who was to testify, and it certainly did not in any way cure the error committed by denying counsel the right to have this confession in the preparation of the case, rather than in the middle of the case.

There is no answer to the fact that counsel were not given the confession in time to prepare his opening statement and to plan the course of the case in the manner of questioning. There is no answer to the fact that this confession was taken from a subnormal insane defendant and then denied to him and his counsel for the preparation of his case although the pretext upon which it was taken by the state's own admission was that the confession could be used for or against him. This court has, wisely or unwisely, limited the constitutional protections afforded to persons interrogated by the police under state charges. Appellant's counsel cannot agree with the refusal to give real protection against the often illegal methods of efficient metropolitan police forces. Certainly in the case at bar the procedure violated the spirit of the protecting statutes and constitutional procedure. We claimed that it violated due process even as now defined. How is a person suffering from the disabilities of the appellant, subnormal, uneducated and mentally sick, going to be defended if his appointed counsel are not permitted to prepare their case, are not allowed to see the confession taken by fraud and before he appears before magistrates? Either are they to obtain information to go forward? The statement of Mr. Ryan appearing in the Transcript; page 52, limns the problem with which counsel are confronted. They had no assistance from client as he was unable to give any. They were refused the record which he had been promised he could use.

The recitations by the appellee herein on the manner in which the defendant was defended, the fact that the defendant readily confessed, are all an evading of the question at issue. That question is simply this—was not defendant deprived of due process and effective counsel by refusal to grant the motion to examine this confession? Does this Court wish to extend a rule that they will not interfere

with state interrogation of witnesses to such a point where they can hold out to a defendant that he can use a confession and then deny him the use of the same when he has counsel who can and are able to protect his rights, particularly in a case where the defendant is of subnormal mentality and suffering from a mental disease?

Conclusion

In conclusion, Oregon is alone in requiring an impossible burden of proof of insanity. Oregon adheres to an unreal rule in insanity. Oregon seeks to punish this boy for a crime which he could not help.

Oregon refuses protection of its statutes to a person charged with such a crime and refuses the counsel appointed to defend him the right to examine the confession so as to prepare for the trial. Oregon makes mockery by its rule in State vs. Butchek, 121 Ore. 41, of the constitutional protection of a preliminary hearing and right against sure incrimination and to counsel.

Oregon would have the counsel of a subnormal, ignorant individual who is insane try their case with only what help such individual could give, and then be bound by the highest degree of proof possible in law. They would deny that individual his presumption of innocence.

This was a shocking crime. The very nature outraged many persons and made a fair trial impossible. The question here is whether the State of Oregon is a responsible party when they permitted this boy to leave the State Hospital although they knew he was suffering of a mental disease and whether the State of Oregon will not compound that wrong by punishing a person for a crime when he committed it because of an injury received in an accident in 1933. The essence of protection afforded in due process re-

volves around the idea that there can be no guilt without fault.

We respectfully ask a reversal of the Judgment below.

Respectfully submitted,

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JOHN D. RYAN, AND
HAROLD L. DAVIDSON,
Counsel for Appellant.

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In

The Supreme Court

of the United States

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,
Appellant;

vs.

THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLEE

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In

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OCTOBER TERM, 1951

No. 176

MORRIS LELAND,
Appellant,

vs.

THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLEE

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported in 190 Or. 598; 227 P. (2d) 785. The denial of the petition for rehearing is found in the Journals of the Oregon Supreme Court for February 28, 1951, noted as a memorandum decision in Oregon Advance Sheets, Volume 52, No. 8, at page 2. Said denial for the petition for rehearing was not reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the brief of appellant.

QUESTION PRESENTED

The question presented by this appeal is the affirmance or reversal of the decision of the Supreme Court of the State of Oregon, recorded in 190 Or. 598, 227 P. (2d) 785, to be determined from the following:

A. Whether or not the Supreme Court of the State of Oregon erred in upholding the validity of the Oregon statutes regarding proof of insanity despite appellant's contention that said statutes 26-929 and 23-122 O.C.L.A. deprived the defendant of his life and liberty without due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, nowithstanding defendant was required to prove he was insane beyond a reasonable doubt and whether or not defendant was permitted by statute to establish the mental disease from which he was suffering as defense to the crime.

B. Whether the Supreme Court of the State of Oregon erred in upholding the alleged refusal of the trial court to make available to defendant's counsel before trial the confession which defendant alleged was taken before he was advised of his right to be represented by counsel and before he was taken before a magistrate and whether said

error, if any, deprived defendant of his life and liberty without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

C. Whether the Oregon Supreme Court erred in sustaining defendant's conviction of a sentence to death in the lethal chamber.

STATEMENT OF FACTS

Morris Leland, then of the age of 22 (R. 339), the appellant, when arrested on August 11, 1949, upon the charge of larceny of an automobile, asked the officer while being taken to the Police Station if he could talk to someone in homicide about a murder. While he was being "booked" at 2:00 a.m. he asked permission of the jailer to speak to a homicide officer about a murder. When the jailer inquired what murder (R. 56-57), he informed him of meeting a little girl who was going bean picking, of taking her down to a clump of trees by the river and of killing her (R. 64). The jailer called the homicide officers and when they arrived at the Police Station at approximately 2:07 a.m. August 11, 1949 (R. 53-54), Leland told these officers the same story, more in detail, and stated that he would direct them to the clump of trees by the river where the body lay but that he did not want to look at it (R. 86). The officers did not know of such a murder (R. 58).

At 2:30 a.m. on August 11, 1949, the officers, accom-

panied by Leland, left the Station for the scene (R. 60), arriving there at approximately 3:00 a.m. (R. 63). While enroute Leland related that he had met a fifteen year old girl between the hours of 4:00 a.m. and 4:30 a.m. on August 5 (R. 61), who had left her home in St. Johns carrying a little metal lunch box, that she was going to meet a girl friend and thereafter get a bus which would take them to the bean fields (R. 86). Leland stated he approached her at the point of a long knife (R. 65), caused her to walk to the Willamette River through a long circuitous route which skirted the business district of St. Johns, and then down to the river to a secluded clump of trees where he had been sleeping prior thereto (R. 61, 345). He stated he kept her prisoner there Friday, Friday night and Saturday morning at which time death released her (R. 61-62).

Friday he attempted to have sexual relations with her but did not complete the act because he found she was a virgin and that it hurt her (R. 367). Also during the day Friday he picked up a long iron bar down near the beach, contemplating he might need it to silence the girl if she started to scream (R. 353). Friday night he actually considered the possibility of killing her (R. 355). Saturday morning the defendant awoke and the girl was some 20 feet away from him. He told her she had better come back and she did. He told her to stay there for a while because, as he said later, "I was about to wind her off." (R. 356)

She wanted to go home and he wouldn't let her because he was afraid she would report this incident to the police and he would be arrested (R. 65).

Approximately 45 minutes passed when a freight train came by with a switching crew and the little girl began to scream. She screamed so loudly that the defendant thought the trainmen could hear her, so he took the iron bar and hit her over the head and hit her again and again. She went down to a sitting position and she tried to get up and he hit her across the bridge of the nose and she lost consciousness. Then he took the knife and plunged it through her unconscious body three times (R. 356 to 359). Later he said that he didn't look to see if she was dead, that he took it for granted that she was, that she should have been anyway (R. 342). Thus he accomplished that which he had considered the night before.

Having done that, he set about to get rid of the evidence. He took the little lunch box and wiped it clean so there would be no fingerprints on it. He covered the body with a blanket and then with driftwood. He threw the knife and iron bar into the river (R. 62, 358-359).

With the aid of flashlights, he led the officers by direct route through the thick underbrush to the body. It was found just as Leland had said, with the thick foliage and undergrowth and tangled bushes forming a natural hut which effectively screened the murder scene from view.

The girl lay in sort of pyre, covered with a blanket upon which tree limbs and driftwood had been placed, with her skull beaten and smashed, one eye was closed and a 4" wound on the left side of her forehead laying bare her skull, and three knife wounds through her chest. A wallet on the deceased identified her as Thelma Taylor (R. 87-88).

The officers returned with Leland to the St. Johns Precinct where the coroner and John R. Collier, Deputy District Attorney (Now deceased) were called. The officers were advised by the Missing Persons Bureau that Thelma Taylor had been previously reported missing by her parents and the description of her clothing tallied with the clothing on the deceased. When the coroner and Mr. Collier arrived, Leland again directed the group to the scene, at which time the coroner removed the body (R. 88-89)

Leland was then returned to the Police Station and was given his breakfast (R. 148) and at about 7:15 a.m. he was fully informed as to his constitutional rights by Mr. John R. Collier, and after being so advised Leland gave an account of the killing, in question and answer form before a court reporter (R. 112, 113, and 340). This account appears in the Appendix to the Record as State's Exhibit 15 (R. 338).

Later on the same day he directed other officers to a

place on the river near where the body was found, where the officers recovered the iron bar that had a handkerchief wrapped around one end and an M-3 Imperial trench knife just where and as Leland had described. Leland examined these two instruments of death and identified them as the ones he has used upon the girl (R. 138 to 141, 354). Leland was then returned to the Station.

At approximately 10:00 p.m. that evening new detectives were investigating this case and Leland was being interrogated by them, when he stated that he wished to make a written statement to them of this affair. They granted his wish, furnishing him with pen and paper and he made what is known as State's Exhibit 18 (R. 160-161), which appears on the Appendix to this Record (R. 367).

Morris Leland was arrested on August 11, 1949. His case was presented to the Grand Jury and an indictment was returned on the 18th day of August, 1949, charging the defendant with Murder in the First Degree.

On the 19th day of August, 1949, the defendant entered a plea of Not Guilty to the crime charged in the indictment. On August 30, 1949, a notice, motion and order were filed by his attorneys wherein the defendant pleaded not guilty by reason of insanity (R. 44). The case was set to be tried originally on the 22nd day of September, 1949. Following requests for continuance by counsel for the defense on September 8, the court extended the trial date first to October 24, 1949, and later to October 27, 1949.

On that date a jury was impanelled and sworn and the taking of testimony commenced November 2, 1949 (R. 5-6-7). The trial was concluded November 7, 1949.

During the trial defendant renewed his demand to see the confession and on the morning of the 3d of November, 1949, the second day that evidence was taken, the court offered to recess the trial to give defendant's counsel an opportunity to examine the confession after it had been offered and received into evidence. This offer was never taken advantage of by the defendant (R. 15 and 134). Also during the trial the defendant was given every opportunity to fully present his testimony on the issue of mental incapacity as well as the special defense of insanity. He was afforded every opportunity to present all his lay witnesses, his Good Samaritan Hospital record regarding his injury when a boy, the Oregon State Hospital record, his veteran's record, and the testimony of his two psychiatrists (R. 158, 159; 173 to 282; 317 to 319). The psychiatrists for the State testified Leland was sane (R. 290).

Appellant asserts in his statement of facts (Appellant's Brief, page 7)

> "the State Hospital at this time was inadequate. It was overcrowded, understaffed, and the authorities there used this lack of facilities as an excuse for turning loose on the public this known and mentally ill sex offender."

Appellee wishes to point out the testimony of Dr. Benjamin F. Williams to the effect that the release by the Ore-

gon State Hospital was the result of a psychiatric examination by the Board of Psychiatrists who found Leland sane, acting upon their best judgment because they did not consider him to be psychotic (R. 236-237).

Morris Leland was granted a full discharge from the Oregon State Hospital on April 24, 1944 as "not insane" (R. 397).

Evidence further disclosed that Morris Leland had an idea that he was tough, that people had better leave him alone and his father believed that he was just lazy, "downright lazy and will do anything to keep from working." (R. 387)

The court fully instructed the jury on the effect of the evidence of insanity, mental incapacity as well as that of legal insanity, and upon all elements of the crime under the Oregon law (R. 321 to 334).

The jury considered all phases of this case and arrived at its verdict finding the defendant guilty of Murder in the First Degree without recommendation of leniency (R. 44), which resulted in the sentence of death in the lethal chambers, affirmed by the Oregon Supreme Court (R. 36), rehearing denied (R. 39), from that decision he has appealed to this court (R. 3).

SUMMARY OF ARGUMENT

The appellee asserts that the appellant was accorded due process of law in every particular. The right of the

state to devise its own procedures for securing substantial justice is unquestioned. The appellant received a fair and impartial public trial in accordance with established criminal procedure, by an impartial judge and jury properly instructed. He had the right to be heard by himself and enjoyed the assistance of counsel. He was confronted with the nature and cause of the accusation against him and furnished with a copy thereof. He had compulsory process for obtaining witnesses in his favor. He was afforded the right to meet his witnesses face to face and given full opportunity to cross-examine the same.

Section 26-929 O.C.L.A. providing that the defendant be required to prove insanity beyond a reasonable doubt places the burden upon the defendant inasmuch as such defense is regarded as a special defense by way of excuse and for the purpose of determining the ultimate disposition of the defendant should he be found insane. The rule that the special defense of insanity is an affirmative one prevails in many jurisdictions throughout the United States.

Under Section 23-122 O.C.L.A. providing that a morbid propensity to commit prohibited acts by a person not shown to be incapable of knowing the wrongfulness of such act, definitely commits the state to the right and wrong test for determining legal insanity, which exists in most of the states of the union.

Section 26-933 O.C.L.A. furnishes the defendant with the presumption of innocence until the contrary is proven and likewise requires the prosecution to establish the guilt of defendant beyond a reasonable doubt. All of these statutes constitute a statement of the established legislative and judicial policy of this state. The state is always required to prove every element of its case, including premeditation, deliberation, malice and intent and so the above statutes coupled with Section 26-955 O.C.L.A. providing for a special verdict if defendant be found not guilty by reason of insanity and for the commitment of the defendant to a lunatic asylum if the court deems it dangerous for the defendant to be at large, the appellee asserts that said statutes fully protect the defendant within the meaning of the due process clause of the Constitution of the United States contained in the Fourteenth Amendment thereof.

The prosecution is required to prove each and every element of the crime such as that the defendant was of a normal mind and had mind enough to premeditate, deliberate, entertain purpose and form criminal intent. All of these elements as well as the other facts of the case must be established beyond a reasonable doubt. The presumption of sanity does not impoft guilt for guilt is never presumed. The presumption of innocence is not constitutionally guaranteed but exists only until the contrary is proved.

The Oregon procedure provides complete protection to

the defendant inasmuch as his testimony on mental incapacity may be heard and considered by the jury upon the question of the defendant's mental ability to premeditate, deliberate and form a criminal intent as well as the fact of whether or not he is legally insane.

The appellee agrees that due process is a living thing and not frozen and further states that under the above procedures the defendant is afforded the full advantage of having the jury weigh and consider the modern techniques of psychiatry as testified to by skilled and trained psychiatrists and therefore is not deprived of the defense of moral insanity, if any.

The undisputed facts in this case indicate the defendant was accorded due process in connection with the admission of his confession. They show the police did not know that murder had been done and that they were under no pressure to pin guilt on anyone. Quite the contrary, defendant Leland upon his arrest for larceny of an automobile voluntarily told the police about the murder, showed them where the body lay and assisted in finding the murder weapons. The accepted test of admissibility is the voluntariness of the confession. Defendant was warned and indicated that he fully understood what he was doing when he gave a question and answer confession before a woman court reporter some five hours after the first voluntary information. It was unnecessary to take him before a

magistrate under Oregon law. Federal rules, as indicated in McNabb v. U. S. 318, U. S. 332, 340, do noot apply in state criminal trials. Defendant was given assistance of able counsel, afforded an opportunity to review the confession during the trial, was arrested and made his confession on August 11, indicted on August 18, and if the defendant were not taken before a magistrate (1) the delay was after

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(1) The record indicates that the State was silent when the court announced its version of a purported stipulation, as follows:

> "MR. RYAN: My understanding was that he hadn't been taken before a magistrate before he made the confession and he hadn't been taken before a magistrate at the time the confession was signed, approximately 24 hours later.
>
> "THE COURT: Substantially, as I recall it. I will accept counsel's statement as to what the stipulation was and so instruct the jury."

Counsel for the State did not have the Municipal Court record at hand during this colloquy and was unable to immediately locate the same. The State does not shrink from the effects of this stipulation which it contends went only to the voluntariness of the confession but in the interests of justice it should be noted that the record of the Municipal Court indicates that the defendant was charged with First Degree Murder on the 11th day of August, 1949, appeared in person before the Honorable J. J. Quillin, Municipal Judge, ex officio Justice of the Peace for the State of Oregon, a committing magistrate, and waived preliminary hearing and was held for the Grand Jury.

the confession and could not have been for any sinister purpose of coercion nor could his detention have been the cause of confession.

On the whole question as to whether the Supreme Court of Oregon erred in affirming the judgment and sentence of death, as specified in appellant's third assignment, appellee will rely upon the proposition that the Fourteenth Amendment of the Constitution of the United States does not limit the power of the states to try and deal with the crimes committed within their borders and it was not the intent to test by decision of the United States Supreme Court every ruling made in course of a state trial (Avery v. Ala. 308 U. S. 444, 446).

The appellee shall stand on the decision of the Oregon Supreme Court in this case (State v. Leland, 190 Or. 598; 227 P. (2d) 785; R. 4 to 36 inclusive).

ANSWERING THE APPELLANT'S ASSIGNMENT OF ERROR NO. 1, THE APPELLEE CONTENDS THAT STATUTES 26-929 AND 23-122 O.C.L.A. DO NOT DEPRIVE DEFENDANT OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IN THAT THE SAID STATUTES PERMIT THE DEFENDANT TO INTRODUCE ALL OF HIS EVIDENCE BEARING UPON MENTAL INCAPACITY.

ARGUMENT

The appellee considers it to be axiomatic that every state is free to devise its own ways of securing essential justice and that it is no longer open to contention that the due process clause of the Fourteenth Amendment of the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein, so long as those procedures and practices do not offend the spirit of fairness and decency common to the notions of justice of English speaking peoples.

As said in Louisville & Nashville Railroad v. Schmidt, 177 U. S. 230, 236; 20 S. Ct. 620, 622.

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere

forms of procedure in state courts or regulate practice therein."

And in Hysler v. Florida, 315 U. S. 411, 416, 417; 62 S. Ct. 688, 691:

"Vindication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each State is free to devise its own way of securing essential justice in these situations. The Due Process Clause did not stereotype the means for ascertaining the truth of a claim that that which duly appears as the administration of intrinsic justice was such merely in form, that in fact it was a perversion of justice by the law officers of the state."

In Adamson v. California, 332 U. S. 46, 67, 68, 67 S. Ct. 1672, 1683, Mr. Justice Frankfurter stated:

"Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this court an exercise of judgment upon the whole course of the proceeding in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offense. These standards of justice are not authoritively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the due process clause imply that judges are wholly at large. The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment. The fact that judges among themselves may differ whether

in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. *An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.*" (Italics ours)

More recently in Gallegos v. Nebraska, Law Ed. Adv. Opinions of the Supreme Court of the United States, Vol. 96, No. 3, page 82 at 86, dated December 17, 1951, we find:

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights."

The statutes under consideration do not offend the spirit of fairness that must pervade every American trial in that they apply uniformly to all persons charged with crime within this state.

Section 26-929 O.C.L.A. in its pertinent part reads as follows:

"When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt; . . . ."

Section 23-122 O.C.L.A. reads as follows:

"A morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor."

That Section 23-122 commits Oregon to the rule that one is punishable who is shown to have known the difference between right and wrong at the time a criminal act was committed and definitely rejects the irresistible impulse theory. One of our leading cases, cited by the Oregon Supreme Court many times, is State v. Wallace, 170 Or. 60 at page 79 (1942), where the Oregon court said:

> "The irresistible impulse doctrine has been definitely rejected, and that type of mental derangement does not relieve the actor from responsibility. State v. Hassing, 60 Or. 81, 118 P. 195 (1911); State v. Grayson, 126 Or. 560 at p. 575, 270 P. 404 (1928); State v. Riley, (supra). The rejection of the irresistible impulse doctrine and the adoption of the right and wrong test is supported not only by judicial decision, but also by legislative enactment." (citing 23-122 O.C.L.A.) (interpolation ours)

The foregoing two sections are applied at a criminal trial whenever the defense of mental incapacity is asserted. In their application the trial court also considers the following sections, Section 26-955 O.C.L.A. which reads as follows:

> "If the defense be the insanity of the defendant, the jury must be instructed, if they find him not guilty on that ground, to state that fact in their verdict, and the court must thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any lunatic asylum authorized by the state to receive and keep such persons, until he become

sane, or be otherwise discharged therefrom by authority of law."

and Section 26-933 O.C.L.A. as follows:

"A defendant in a criminal action is presumed to be innocent until the contrary is proven; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted."

All four of these sections were adopted in the original Oregon Code, Deady's Code, 1845 to 1864. They were enacted as a part of the Code of Criminal Procedure adopted by the legislature in October, 1864, and are the established legislative policy of the state.

By the act of June 27, 1844, the legislative committee of Oregon provided that the common law of England and the principles of equity not modified by the statutes of Iowa and this government and not incompatible with its principles, shall constitute a part of the law of the land. This law was retained at the time of the adoption of the Oregon constitution in 1857, Article XVIII, Section 7. (See, Perozzi v. Ganiere, 149 Or. 330, 345, 346; 40 P. (2d) 1009.

That the laws in question were rooted in the common law of England is well demonstrated by the decision rendered in the famous M'Naghten's case (8 English Reprint 718), where the Opinion of Judges (10 Clark & Fin. 205) laid down the rule that one who seeks to defend himself from a charge of crime must establish the fact that it must

be *clearly proved* at the time of committing the act the party accused was laboring under such defect of reason and disease of mind as not to know the nature and quality of the act he was doing or if he did know it, *he did not know he was doing what was wrong.*

The earlier English and American cases looked upon the defense of insanity with some suspicion and in order that it might not be abused, held that for a defendant to be acquitted on that ground his irresponsibility must be clearly proven (See Insanity as a Defense in Criminal Law, Weihofen, The Commonwealth Fund Publishers (1933) page 151).

The words "clear" and "clearly" have been interpreted as the measure of proof in most of our earlier cases. The courts usually held that an issue cannot be said to be clearly proved so long as a reasonable doubt remains (See, Weihofen, supra, 151, 152).

When Judge Deady drafted these statutes he evidently had in mind the English common law and the earlier American decisions which placed the burden upon the defendant to prove his insanity beyond a reasonable doubt. An annotation of People v. Sprague, 2 Park Criminal Reports of N. Y., 43 appears wherein the court charged at page 48:

> "That insanity as a defense was an affirmative matter; and in order to be allowed, must be proved beyond a reasonable doubt . . . being at the time incapable of knowing right from wrong."

Section 26-929 O.C.L.A. and Section 23-122 as well as 26-933 and 26-955 O.C.L.A. have never been modified and constitute the legislative policy of this state. They have been judicially affirmed commencing with State of Oregon v. Murray, 11 Or. 414, 5 P. 55, a decision rendered in 1883, through State v. Grieco, 184 Or. 253, 195 P. (2d) 183, and State v. Garver, 190 Or. 291, 305; 225 Pac. (2d). 771, decided in 1950, the Oregon Supreme Court has held that the defense of insanity must be proven beyond a reasonable doubt. That this procedure is now the legislative policy of this state, cannot be contradicted and is a settled usage of long standing within this state.

The appellee contends that the procedure required and the elimination of the so called "irresistible impulse doctrine" are not shocking to the canons of decency and fairness of Anglo Saxon peoples because they afford the defendant every right to a fair trial required by the American concept of due process of law.

Due process of law insures a fair and impartial public trial in accordance with established criminal procedure by an impartial judge and jury properly instructed. It requires the right to be heard and enjoy the assistance of counsel. In criminal cases it requires that the defendant be confronted with the nature and cause of the accusation against him and that he be furnished with a copy thereof. It requires that the defendant have compulsory process for ob-

taining witnesses in his favor. It requires that he be afforded the right to meet his witnesses face to face and be given full opportunity to cross-examine the same.

Under Section 26-933 O.C.L.A. the defendant is clothed with the presumption of innocence until the contrary is proven. Likewise the prosecution is required to establish the guilt of the defendant as well as all of the material elements beyond a reasonable doubt, to wit: that the defendant Morris Leland killed one Thelma Taylor; that the killing was done unlawfully, feloniously and purposely, and with deliberate and premeditated malice. That "purposely" meant an intent to do or commit the act charged in the indictment; that "deliberation" was the act of mind which examines and considers; that "malice" related to the actual state or condition of the mind of the person who committed the act; that "premeditation" is the process of thinking about the act before committing it; that deliberation and premeditation must have arisen while the *mind was in its normal state* and while the defendant was master of his own passion and temper; that the design must have been formed in cool blood; (R. 321-322) that if the mind fully and calmly forms a design to kill and the act is committed pursuant to such design, then it is premeditated, no matter how short or how long an interval of time may elapse before such design is executed (R. 323).

Similarly, the jury was instructed as required in Oregon

upon the elements of lessor included crimes, Murder in the Second Degree and Manslaughter (R. 323).

Following the full and complete instruction in accordance with the Oregon law upon the special defense of insanity, the court again instructed upon the effect of the elements of the crime of Murder in the First Degree and in the other degrees (R. 330 to 334), and required the state to establish every element of the crimes beyond a reasonable doubt. It further instructed that the evidence adduced during the trial to prove defendant's insanity shall be considered and weighed by the jury *whether or not they found the defendant to be insane in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act wilfully and act maliciously,* and further, *if the jury found the defendant lacking in such ability, that the defendant could not have committed the crime of Murder in the First Degree* (R. 330).

The court also instructed that the defendant *is presumed to be innocent* and that this presumption attends him throughout his trial until such time as the jury is convinced of his guilt beyond a reasonable doubt. (R. 326).

The court instructed the jury that the law presumed every man to be sane until he established in the mind of the jury beyond a reasonable doubt the fact of his insanity. This the court stated placed the burden of proving insanity upon the defense and that if the jury had any reasonable

doubt as to whether the defendant at the time of the commission of the alleged homicide was sane or insane, *such defense* should be rejected (R. 326). This procedure is not unknown to American law. As a matter of fact, with the exception of the quantum of proof required, to wit, "beyond a reasonable doubt" the procedure is followed in 22 states of the Union (Weihofen, Insanity as a Defense in Criminal Law, p. 148-149). See also Wigmore, Vol. 9, 3rd Ed. 1940, Art. 2501 (3).

We read in Morrison v. California, 291 U. S. 281 at 284:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, vol. 5, 2486, 2512 and cases cited."

It is the contention of the appellee that the presumption of sanity which is afforded the state in criminal prosecutions standing naked and alone *does not import guilt.*

Until the state has produced other evidence upon each and every material allegation of the crime charged, that the defendant is guilty, the defendant under Oregon pro-

cedure has nothing to prove. The presumption of innocence remains with a defendant throughout the trial until the contrary is shown beyond a reasonable doubt and that is all the defendant is entitled to. That is all the Oregon statute provides. That is all American courts have ever required in the spirit of fairness.

In passing upon the question of the special defense of insanity, the jury is required to return a special verdict and was so instructed in this case (R. 332, 334). The purpose of this special verdict is set forth in Section 26-955 O.C.L.A. previously quoted, which provides for the confinement of the defendant if the court deems him to be dangerous to be at large, without the necessity of any further trial by the court upon his mental condition.

Should the jury find, from the same evidence offered by the defendant upon mental incapacity, that the defendant is unable to or has not mind enough to premeditate, deliberate, entertain malice, form criminal intent, or commit any of the other elements of the crime, it is required to find the defendant not guilty in its general verdict (R. 332). Thus it seems to the appellee that the defendant was afforded the greatest possible protection in the consideration of his defense of mental incapacity, whether it be by legal insanity or otherwise.

Under Oregon law, the burden of proof in a First Degree Murder case never shifts during the trial but rests

upon the state to the close and the jury was so instructed (R. 324).

We therefore submit that so far as the burden and quantum of proof is concerned, the practice is entirely reasonable for should the jury fail to find the defendant to be legally insane beyond a reasonable doubt, but nevertheless find him to be mentally defective by a preponderance of the evidence, it has been instructed to consider this testimony upon the question of the elements of the crime and surely the state could not secure a conviction and sustain its burden of proof beyond a reasonable doubt if the jury thought the defendant to be mentally irresponsible.

The question as to whether the irresistible impulse doctrine is more modern than the right and wrong test has been debated for years. This question has been raised in Oregon many times and has been answered in an able decision found in State v. Riley, 147 Or. 89 at page 99, wherein the court held that under our statute and the early decisions of the Oregon court, the irresistible impulse doctrine has been definitely rejected and the right and wrong test adopted by statute and judicial decisions in this jurisdiction.

In the instructions in the instant case given by the court, this test was applied (R. 326) and there is testimony that this defendant could distinguish the difference between right and wrong, and that he had the ability to deliberate, premeditate, form a plan and act upon it (R. 290, 291).

Appellant in his argument makes much of a so-called modern conception of insanity and asserts that due process requires the law to keep abreast of scientific progress. He contends that the State of Oregon has not kept abreast of the modern trend of psychiatry and the law.

In answer to this contention the appellee calls attention to the elemental fact that it is a lay jury which passes upon the mental capacity of the defendant. If medical science has advanced, so is the lay jury given opportunity to hear the expressions of modern psychiatrists informed of the latest techniques. A psychopathic personality without psychosis is an individual who is not mentally ill but belongs to a great group whose personality structure is self-centered, hostile and insensitive for ethical or moral rights. They know the difference between right and wrong, and this disorder is one of emotions, basically, not of the intellect and the knowing (R. 289-290). They are capable of planning by conscious processes, differing from the psychotic patient whose planning contains many of the elements of the unconscious (R. 231).

In Adamson v. California (332 U. S. 46, 67 S. Ct. 1672) this court refused to set aside as unconstitutional and as invalid under the 14th Amendment to the United States Constitution certain provisions of California law which permitted the failure of a defendant to explain or to deny evidence against him, in a criminal trial, to be commented

upon by court and by counsel and to be considered by court and jury. It seems to us that the statute sought to be set aside in Oregon could not possibly shock the community more than the statute upheld in the California case (supra). It is urged that neither violates the principles of substantial justice.

Thus the procedures in Oregon excepted to by the appellant are not shocking to the community nor do they violate in any way the spirit of fairness that is within the concepts of the vague contours of due process.

Also these laws having their roots in the English common law are the settled customs and usages in Oregon and have been since statehood.

Reasonable minds may have differed upon the burden and quantum of proof required in a case but this Court has held that it will not disturb as violative of due process under the Fourteenth Amendment of the Constitution of the United States, settled usages and modes of procedure previously existing and of long standing. (Powell v. Alabama, 287 U. S. 45, 65; 53 S. Ct. 55, 62.)

Counsel for appellant in their brief have raised the point of prejudice preventing due process. Appellee answers this point by referring to parts of the decision of the Oregon Supreme Court wherein they stated that only counsel's un-

supported statement of a publication had so excited the public mind that the defendant could not obtain a fair trial unless a postponement was granted. The court further held that no evidence was brought before it, nor was the voir dire examination, and, it could be assumed that no such inflamed state of the public mind was disclosed (R. 8). Further, that there is no showing of prejudice against the defendant (R. 9).

The evidence in this case warranted only a verdict such as was rendered. The Supreme Court of Oregon opinion commented as follows:

> ". . . for the crime was so wanton and inhuman, *and so amply proved,* that any other verdict than one of guilty would have been a *shocking miscarriage of justice,* while the rights of the defendant were fully protected by a careful and able judge and no errors prejudicial to him were committed." (Italics ours) (R. 6)

This assignment is without merit.

ANSWERING APPELLANT'S SECOND ASSIGNMENT OF ERROR, THE APPELLEE STATES THAT THE COURT BELOW DID NOT ERR IN UPHOLDING THE REFUSAL OF THE TRIAL COURT TO MAKE AVAILABLE TO DEFENDANT'S COUNSEL BEFORE TRIAL A CONFESSION TAKEN FROM DEFENDANT PRIOR TO HIS BEING TAKEN BEFORE A MAGISTRATE AND ADVISED OF HIS RIGHT TO COUNSEL, AND THAT THE DEFENDANT WAS

NOT DEPRIVED OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

We, of counsel for the appellee, feel that the contention of appellant's counsel is highly fanciful and that the construction placed thereon is almost fantastic. This is not a case where a poor ignorant Negro boy after being almost mobbed in a highly inflamed community was denied counsel and forced to trial, such as in the case of Powell v. Alabama, 287 U. S. 45; 53 S. Ct. 55, nor is it a case that is similar to a situation where the accused was questioned for about a week and finally on the last day, questioned all night and "broke at sunrise" such as in Chambers v. Florida, 309 U. S. 227; 60 S. Ct. 472. Neither is this a case where a 15 year old Negro boy was questioned through the dead of night by relays of police to force him to confess, such as in Haley v. Ohio, 332 U. S. 596, 68 S. Ct. 302. Nor is this a case where an accused was questioned for a prolonged period under bright lights during late night sessions continually for 36 hours without rest or sleep. Ashcreft v. Tennessee, 322 U. S. 143; 64 S. Ct. 921.

This is a case where the accused volunteered the information that he had murdered the deceased immediately

upon his arrest. The officers did not know that a murder had been committed and were making no efforts to pin a murder on anyone. What counsel might have done had he been appointed before Leland volunteered the information that he had committed a crime, is of course only open to speculation. However, we feel that the duty of a defense attorney goes no further in a case of this kind than that of advising the defendant of his rights and seeing that he gets a fair trial. Counsel had the opportunity to consult with the accused and to prepare his defense.

Counsel could have seen the confession during the trial and refused to take advantage of his opportunity. The court even offered to recess until he could fully prepare himself (R. 134). In this connection see State v. Leland, 190 Or. 598, 617; 227 P. (2d) 785 (R. 9, 15).

Counsel was appointed on the 22nd of August, 1949, and we submit had ample opportunity to consult with accused and prepare his case for trial (R. 284, 285, 317), which occurred on the 27th of October, 1949. In fact in passing upon this question, our Supreme Court at page 605 of the statement commented in their decision.

> "The defendant being without funds, the court appointed counsel to defend him. *In the best tradition of the Bar these gentlemen discharged their duty to their client with zeal and ability, both in the trial court and here.* That their efforts have been unsuccessful is no reflection upon them, for the crime was so wanton

and inhuman, and so amply proved, that any other verdict than one of guilty would have been a shocking miscarriage of justice, while the rights of the defendant were fully protected by a careful and able judge and no errors prejudicial to him were committed." (Italics ours.)

The true test of the admissibility of the confession in Oregon and we believe throughout the United States, is one of voluntariness. Any confession which is influenced by threats, coercion or hope of reward or other benefit is not voluntary. The burden is always on the prosecution to establish this. In Oregon, as well as many other states, it is unnecessary for officers to take an accused before a magistrate that he may be advised of his rights before taking a confession or statement. Common sense would indicate this to be a proper procedure.

There is no evidence in the facts of this case of the use of any force. In fact, counsel stated that he did not believe there was any force used (R. 132). There is nothing wrong with taking a confession of a defendant being in custody. There is nothing in the record that indicates defendant was kept awake all night (R. 136) to secure a confession but on the contrary the record clearly shows that Leland had confessed this crime when he came into the police station at 2:00 a.m. (R. 56-57), and the remainder of the time that early morning was occupied in corroborating his confession. Also that during the ensuing early morning hours he went

to the scene, identified the body and that during the trip to and from the site discussed what happened and had fully made an oral confession by the time he returned to the police station (R. 145, 146).

After being given his breakfast, a confession was taken by question and answer method before a woman reporter, which was a logical procedure. The confession itself shows that Leland was thoroughly advised of his rights by Deputy District Attorney John R. Collier (now deceased), and this appears patent upon the face of the confession. Moreover this is substantiated by witnesses. That Leland understood it was indicated by his own admission. That there was no fraud involved was indicated by the testimony of Captain Brown who stated that what he had said about the confession being used either for or against him would of course depend upon the substance of the confession. (R. 149)

The subsequent confession, State's Exhibit 18 (R. 367) taken at 10:00 p.m. clearly indicates that Leland knew the testimony in his confession would be used against him. During the taking of the subsequent confession at 10:00 p.m. the record indicates that the officers fully advised Leland as to his rights even though he had personally made a request to have the statement taken. (R. 153-154)

The confession, State's Exhibit 18, was read back to Leland, piece by piece, and elaborated upon by him. (R. 165). It was the natural thing for the evening shift officers

to review the reports and determine whether a statement had been taken. There is no evidence that Leland had not had any rest during the day Friday for at 4:15 that evening he was in jail. All of the officers testified that at no time were any threats or other methods of coercion used upon Leland and found that no promises of leniency or reward were extended to him. This is a case where the matter had been preying upon Leland's mind for a week and "the guilty flee when no man pursueth." The only information that the officers had up to the Leland confession was a missing persons report in regard to one Thelma Taylor, 15 year old girl who had left home on August 5, to go bean picking.

Under the holding in State v. Butchek (121 Or. 144 at p. 153; 253 P. 367), the court held it to be unnecessary for officers to advise an accused of his rights before taking a statement of confession, as that duty devolves upon the magistrate when the accused is taken before him. This rule is a firmly established practice in Oregon. It is approved in the very able opinion of Mr. Justice Brand in the case of State of Oregon v. Folkes (174 Or. 568, 580; 150 P. (2d) 17), where he stated:

> "A confession, even though made to police officers and while in custody, is admissible if not induced by fear, violence, threats, or promises of reward or immunity, and this is true although the accused may not have been cautioned that his statement might be used

against him or advised as to his legal rights. State v. Moore, 124 Or. 61, 262 P. 859; State v. Butchek, 121 Or. 141, 253 P. 367, 254 P. 805; State v. Stevenson, 98 Or. 285, 193 P. 1030; State v. Wilder, 98 Or. 130, 193 P. 444. The character of inducement which will render a confession involuntary is well stated in the case of State v. Green, 128 Or. 49, 273 P. 381. In that case, the court, speaking of a confession, said:

> "'. . . The only fair test, if such it may be called, which can be applied is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession, for the object of the rule is not to exclude a confession of the truth but to avoid the possibility of a confession of guilt from one who is in fact innocent: . . .'"

This rule is a firmly established practice in Oregon.

It is significant that the confessions were made on the day of Leland's arrest. This would indicate that they were not influenced by long confinement in prison.

As was said by this court in Gallegos v. Nebraska, as reported on December 17, 1951, L. Ed. Adv. Opinions for the United States Supreme Court in volume 96, No. 3, page 82, 88 in discussing the rule of the McNabb case which counsel seeks to apply here:

> "The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do not require exclusion of the confessions or plea as involuntary. The rule of the McNabb Case considered

recently in United States v. Carignan, No. 5, October Term, 1951 (..... U. S. ....., ante, 57, 72 S. Ct. .....), is not a limitation imposed by the Due Process Clause. McNabb v. United States, 318 U. S. 332, 340, 87 L. ed. 819, 823, 63 S. Ct. 608; Lyons v. Oklahoma, 322 U. S. 596; 597, note 2, 88 L. ed. 1481, 1483, 64 S. Ct. 1208. Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. *That power over state criminal trials is not vested in this Court.* A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state." (Italics ours)

In connection with the argument of appellant with reference to the invalidation of the confession by reason of not having been taken before a magistrate before it was made, the appellee rests its case on the above decision.

The facts bear out that Leland knew what he was doing and that it was wrong and the jury passed upon all of the testimony and the testimony of skilled psychiatrists versed in modern techniques, found that to be true. His actions clearly indicate this. He wiped his fingerprints from a lunch bucket; he covered the body in a thick clump of brush so that it could not be seen; he threw the murder weapons into the river so that they could not be found. He conversed with the officers during his confession and carefully led them to the scene of the crime.

Previously it had been determined by the psychiatrists at the Oregon State Hospital that he was sane in 1944 and in that determination the doctors had reported that it appeared that his commitment to the hospital was one of a means devised to escape punishment (R. 244).

Lastly, when the confession was taken and later signed by Leland the record indicates that it was thoroughly read to him while Leland kept a copy of it in his hands and followed it closely; that he made changes in the confession of addresses and initialed them and later that evening when he had given a confession in his own handwriting, he sat down with the officers and carefully elaborated on each sentence, piece by piece. It appears that the defendant gave a purely voluntary confession to a most dastardly and atrocious crime which was preying upon his conscience.

The court first considered it upon an offer of proof authorized in our procedures, (State v. Jordan, 146 Or. 504 at pages 509, 510, 511; 26 P. (2d) 558; 30 P. (2d) 751). The Oregon rule is well stated in State v. Layton, 174 Or. 217, 230 as follows:

> "As to the admissibility of defendant's confession, it must be borne in mind that when this confession was offered, the trial court in the absence of the jury conducted an inquiry preliminary to its admission; and at the conclusion of such inquiry the trial court overruled defendant's objection and held in effect that the confession of defendant was obtained without the influ-

ence of hope or fear. Under those circumstances, the determination of the trial court will not be disturbed unless there is clear and manifest error. State v. Blodgett, 50 Or. 329, 92 P. 820; State v. Spanos, 66 Or. 118, 120, 134 P. 6; State v. Morris, 83 Or. 429, 440, 163 P. 567; State v. Stevenson, 98 Or. 285, 193 P. 1030, and authorities there cited."

The evidence introduced by the state as to the voluntariness of this confession is uncontradicted.

This assignment is also without merit.

ANSWERING APPELLANT'S ASSIGNMENT OF ERROR NO 3, THE SUPREME COURT OF OREGON PROPERLY SUSTAINED DEFENDANT'S CONVICTION AND SENTENCE TO DEATH IN THE LETHAL CHAMBER.

ARGUMENT

This Third Assignment is an endeavor by the appellant to enlist this court in the ardous task of reviewing all of the copious objections presented by counsel to the Oregon Supreme Court.

The appellee rests his argument so far as this assignment is concerned upon the decision of the Oregon Supreme Court in the case of State v. Leland, 190 Or. 598, 609; 227 P. (2d) 785 (R. 4 to 36), and upon the fact that the United States Supreme Court will not invoke its prerogative under due process to test for decision every ruling made in the

course of a state trial, Avery v. Alabama (308 U. S. 444, 446; 60 S. Ct. 321), so long as adequate and appropriate procedural standards to protect the accused are maintained at all times. (See Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472), as was done in the case at bar as the record clearly indicates.

CONCLUSION

This case was tried before an honorable and capable jurist who is the senior trial judge in this jurisdiction. He is thoroughly experienced in criminal law and the rights of the accused were meticulously and carefully safeguarded.

The Fourteenth Amendment is designed for the equal protection of all the citizens of all the states composing this great United States. It is designed to protect all society as well as due process for the guilty.

The appellant was defended under the best traditions of the bar by able counsel. The appellant in the instant case received every consideration and constitutional guaranty to which he is entitled. He was tried before an impartial judge and honest jury and in an atmosphere of judicial calm. The evidence on this crime was so wanton and inhuman and so amply proved that any other verdict

than one of guilty would have been a shocking miscarriage of justice.

The decision of the Oregon Supreme Court should be permitted to stand and judgment affirmed.

Respectfully submitted,

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